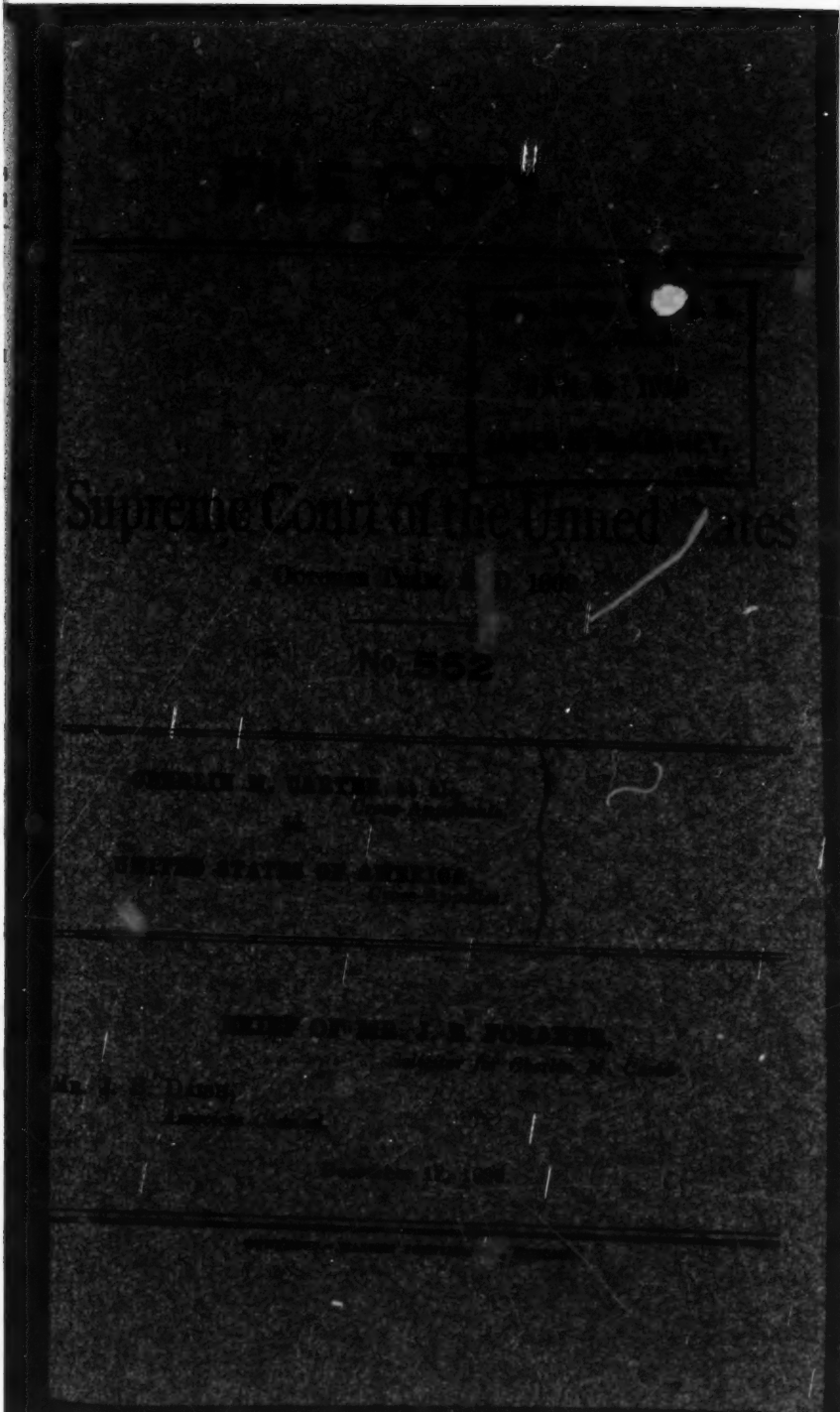

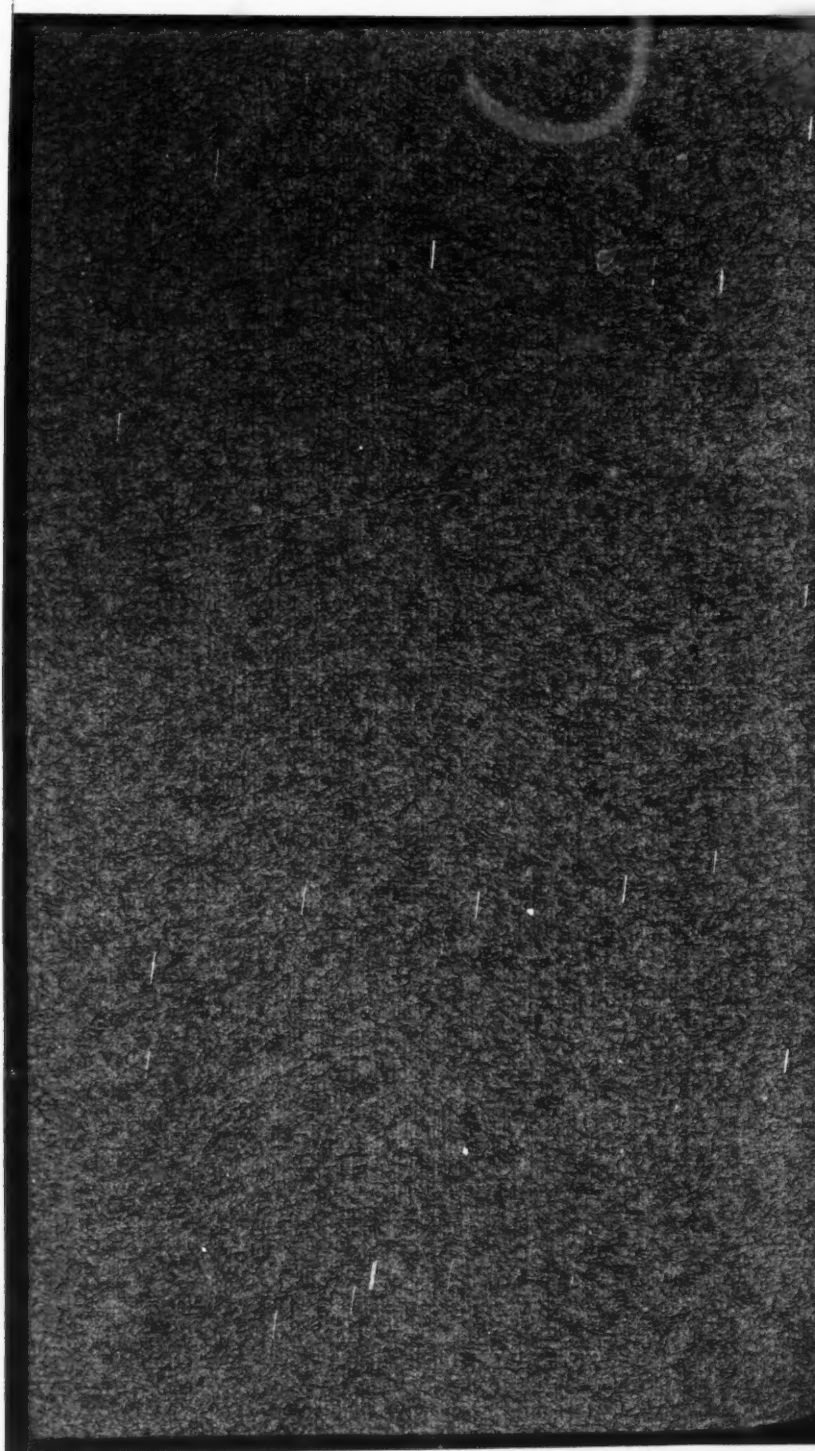

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

No. 552

OBERLIN M. CARTER, et al.,
Cross-Appellants,
vs.
UNITED STATES OF AMERICA,
Cross-Appellee.

BRIEF OF MR. J. B. FORAKER.

NOTE.

The opinions of the Circuit Court and of the Circuit Court of Appeals are printed as an appendix to this brief.

In view of the voluminous record, a condensation thereof has been prepared for the convenience of the Court. This volume, entitled "Bill of Complaint, Findings of the Courts, and References to the Evidence," is filed herewith. References to the record made in this brief will be found therein.

There has also been prepared a condensed statement of the case, and arguments in behalf of Oberlin M. Carter, with references to the record, to which especial attention is invited. This argument, as a Condensed Brief, is printed in the front part of the volume filed herewith, which contains also a list of the witnesses and a description of their testimony.

STATEMENT OF THE CASE.

This is a suit brought by the Government against Oberlin M. Carter and others for the purpose of recovering certain specific securities and real estate to which it is claimed the Government is equitably entitled.

This brief will be confined as nearly as may be convenient to the case of Captain Carter upon the theory that the other defendants will stand or fall with him, except as to certain details which will be dealt with in another brief.

I.

The claim of the Government is that, the Government having determined to make certain river and harbor improvements at Savannah, Georgia, and in that vicinity, Carter as the engineer officer in charge entered into a conspiracy with certain contractors to defraud the Government by so manipulating the specifications and the letting of the contracts as practically to prevent competition with them in securing such work, and by thereafter superintending the performance of the work in such a lax and inefficient manner as to allow faulty construction and the use of inferior materials, all to be paid for at extravagant prices, and by approving and paying false estimates and vouchers therefor; that in pursuance of this scheme the Government was defrauded in connection with a number of specified contracts to the amount of more than two

millions of dollars, of which Carter received approximately one-third, and that the securities and real estate sued for in this case are a part of the wrongful gains thus realized.

II.

L. D. and I. S. Carter, one an uncle and other a brother of Captain Carter, are charged with aiding him to conceal the fraudulently acquired funds, and with having in their possession certain real estate and other property purchased therewith, which it is sought to recover.

III.

All the allegations of the bill were denied.

Upon the issues so joined the case was heard upon the evidence, argued by counsel and submitted to the Circuit Court, which found there was no conspiracy as charged in the bill, and that Carter was not guilty of any fraud in connection with the letting or the performance of the several contracts, and that he had accounted for all moneys entrusted to him for disbursement; yet notwithstanding such findings, that court also found that the contractors had realized excessive profits and that they had divided them with Robert F. Westcott, Carter's father-in-law, but refused to hold that Carter had actual knowledge of the fact that his father-in-law was a partner and shared in the division of profits, and held that Carter "must, *as a conclusion of law,* be held chargeable with knowledge of what was being done in the premises."

Upon this conclusion, the Circuit Court thereupon decreed that the complainant should recover all the property and securities shown by the testimony to have come from or to have been the proceeds of the profits so realized and shared by Westcott.

The court further found that among the securities sued for were certain bonds and stocks of the par value of $34,600, described at page 390 of the record, that had not been purchased with profits derived from the contractors, but with "the private funds" of Robert F. Westcott and O. M. Carter, and thereupon entered a decree therefor in Carter's favor.

The Circuit Court also refused to enter any deficiency decree against O. M. Carter or L. D. Carter, but awarded a deficiency decree against I. Stanton Carter for failure to account fully for all the trust funds that had come into his possession.

The Circuit Court of Appeals.

The Circuit Court of Appeals concurred with the Circuit Court in the findings mentioned, but announced that

> "we are not satisfied that the right of the United States 'to a decree awarding to it' all the property in question 'arising from funds made up of profits realized by the contractors' therein, may rightly rest, as there [decree of Circuit Court] stated, upon the proposition that Carter must, 'as a conclusion of law, be held chargeable with knowledge of what was being done in the premises.'" (Rec., 13426.)

The Circuit Court of Appeals then proceeded to hold upon grounds and reasons given that Carter "must have" had actual knowledge, and upon such

finding, affirmed all that part of the decree of the Circuit Court adverse to Carter, and set aside that part of it which denied a deficiency decree against him and against L. D. Carter, and ordered a modification of the decree in favor of O. M. Carter in that respect, and the entering of a deficiency decree against him amounting to $105,-019.66, against which he should stand credited with the amount of the decree rendered in his favor by the Circuit Court; and reversed the Circuit Court as to its decree in favor of L. D. Carter, and directed that a deficiency decree be entered against him for $7,577.04; and directed that the deficiency decree against I. Stanton Carter for $11,454.18 be modified by increasing the amount thereof to the sum of $18,204.18.

Thereupon the appeal and cross-appeals to this court were taken and perfected as shown by the record.

If it be objected that the deficiency decrees directed by the Circuit Court of Appeals against the Carters have not yet been entered by the Circuit Court and made final and that they were not therefore appealable when this case was brought to this court, it is a sufficient answer that these decrees leave nothing for the Circuit Court to do except the ministerial work of making such corrections as conformity may require and that they were therefore final decrees for the purposes of appeal (146 U. S., 537).

But if it were otherwise, the fact remains that the main decree against O. M. Carter was affirmed by the Circuit Court of Appeals without modification or

qualification, and its affirmance was therefore not only final but entirely independent of and separated from the decrees with respect to the deficiencies, and an appeal therefrom was therefore properly taken and all the questions raised by it are in consequence now before this court for decision, and from the nature of the case a decision upon the merits of this main appeal will settle the law of the case for the final adjustment in the courts below of the deficiency decrees. Otherwise they will, of course, be appealable when entered and made final.

ERRORS RELIED UPON.

All the assignments of error were made in good faith and are relied upon. They respectively have reference to different questions presented by the record.

In general they amount to:

1. An entire failure of proof to show any fraud or conspiracy as alleged in the bill.

2. In so far as there is any proof tending to show fraud, it involves a fatal variance from the allegations of the bill.

3. That under the bill and the prayer for equitable relief, it was error to grant the money deficiency decrees which were rendered against the cross-appellants.

4. Even if it had been competent to render such decrees under the bill and the prayer thereof, there was no proof to support the same, particularly in view of the contract of November 6, 1901.

5. The contracts having been properly let according to law and honestly performed, it was error to hold that the complainant could recover any of the profits made in performing those contracts.

ARGUMENT.

The first two assignments of error specifically raise the questions of (1) a failure of the proof to support the allegations of the bill and (2) a fatal variance of the facts the proof does establish from those that constitute the complaint.

For this reason it is permissible to state with more detail than would otherwise be necessary the allegations of the bill, the answers thereto and the findings of the lower courts.

The Bill.

The bill sets forth that Carter was an engineer officer of the United States Army in charge at Savannah, Georgia, of certain river and harbor improvements at that place and along the Atlantic Coast in that vicinity; that as such officer in charge of such work he was vested with extensive and varied powers, duties and discretions whereby he was enabled to determine what projects for river and harbor improvements should be undertaken, their nature, extent and cost; that he practically controlled the framing of the specifications for such work, the forms of advertisements for competitive bids, the receipt of proposals, the making of awards, the form of contracts, the superintendence of construction, the approval of materials used, the modifications, if any, of contracts, the approval of estimates and accounts for work done and the payment of the same.

The bill then proceeds to make numerous general charges against Carter, most of them criminal in their character. Together with these general charges are set forth in the most detailed, specific and unqualified way numerous specifications of derelictions and violations of law and duty, each in itself, or in connection with other charges and specifications that are made, sufficient to amount to a crime.

The first of these general charges is that Carter, together with certain contractors named in the bill (Greene, the three Gaynors and one Michael A. Connolly), in the year 1891 "devised, concocted and put in force a certain fraudulent scheme for the purpose of defrauding the Government."

In other words, the first charge, and the one upon which every other charge is based, and to which every other charge has relation, is a charge of conspiracy; that Captain Carter, the official and the trusted representative of the Government, entered into a scheme with the contractors named for the purpose of defrauding the Government.

The bill thereupon sets forth the nature of the plan or scheme to defraud that was adopted by the alleged conspirators, together with numerous other charges as to acts done in pursuance of the conspiracy and in the commission of fraud with respect to the making of the contracts, the character of the work done, the approval of alleged fraudulent accounts, the alleged division by the conspirators of profits arising from their fraudulent transactions, and the receipt by Carter of a share of such profits.

These charges, stated briefly, are as follows:

1. The conspiracy above mentioned.

2. Captain Carter was to fraudulently exercise the powers of his office and the discretion with which he was vested in favor of said conspirators and against the Government in connection with the public work that was to be done.

3. In this behalf he was to prepare specifications improperly framed and of misleading character for the purpose of preventing fair bidding.

4. He was to allow insufficient time for other bidders, in advertising for bids.

5. He was to withhold specifications and information from prospective bidders not in the conspiracy.

6. He was to furnish secret information to his co-conspirators, as to other bids, and as to the manner in which he would require the contract to be performed, for the purpose of giving the contractors who were in the conspiracy undue advantage in bidding.

7. He was to "introduce into the specifications the novel provision of having two or more designs of mattresses specified to be bid for by the proposed contractor at one price for either design, the one design to be very much more expensive for the contractor to furnish than the others, but the engineer in charge to have the option after the contract should be let to call for either design he might choose to have put in the work."

8. The specifications to be so prepared by him as to be vague with respect to the character, quantity and quality of material to be employed in the work.

9. Carter as engineer officer in charge was to require the largest possible quantities of high-priced material, and by a "fraudulent, unfair, rigid and

stringent construction" placed upon the specifications, was to prevent the successful execution of the contract if it should fall, under the bidding, to anybody not in the conspiracy.

10. That when the contract was let to any of the conspirators, Carter was to favor them by a "fraudulent, strained and lax construction" of the contract, and he was to further favor them by a fraudulent acceptance of cheap and inferior materials and construction, not in accordance with the specifications.

11. That he would fraudulently approve for payment accounts rendered by said conspirators for inferior material and work to be put into such works, as aforesaid, at the fraudulent and exorbitant prices named in the contract.

12. That all the conspirators should co-operate to suppress all knowledge of the frauds so to be committed.

13. The net profits of the fraudulent scheme were to be divided between the principal conspirators, Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter.

14. The next general charge is that, pursuant to this scheme to defraud the Government, Carter, as the engineer officer in charge of the Savannah District, "did, on or about the *first day of January, 1891,* commence to put said fraudulent scheme in operation."

(Attention is called to the date here given because the first charge is that the conspiracy was formed "about the year 1891." From this charge it would seem that according to the theory of the Government, the conspiracy must have been formed prior to 1891, therefore as early at least as "about the year 1890.")

This charge further sets forth that Carter continued to act in pursuance of this fraudulent scheme with respect to all successive contracts "until on

or about July 20, 1897," and that during this period the following contracts were let:

4,572, May 4, 1891, John F. Gaynor, Contractor, Improvement at Cumberland Sound.

4,637, July 20, 1891, W. H. Walsh, Contractor, Improvement at Fort Clinch.

4,655, Sept. 9, 1891, John F. Gaynor, Contractor, Improvement at Savannah River, Augusta.

4,820, Sept. 16, 1892, E. H. Gaynor, Contractor, Improvement at Cumberland Sound.

4,960, Oct. 22, 1892, Atlantic Contracting Co., Contractor, Improvement at Savannah Harbor.

4,963, Oct. 24, 1892, W. H. Walsh, Contractor, Improvement at Savannah River, Augusta.

5,127, Dec. 20, 1892, Atlantic Contracting Co., Contractor, Improvement at Darien Harbor.

5,133, Dec. 20, 1892, Atlantic Contracting Co., Contractor, Improvement at Altamaha River.

5,253, March 1, 1893, Atlantic Contracting Co., Contractor, Improvement at Darien Harbor.

5,254, March 20, 1893, Atlantic Contracting Co., Contractor, Improvement at Brunswick Harbor.

5,811, Nov. 15, 1894, Anson M. Bangs, Contractor, Improvement at Cumberland Sound.

6,049, April 20, 1895, A. T. Gaynor, Contractor, Improvement at Darien Harbor, Etc.

6,515, Oct. 8, 1896, Atlantic Contracting Co., Contractor, Improvement at Savannah Harbor.

6,517, Oct. 8, 1896, Atlantic Contracting Co., Contractor, Improvement at Cumberland Sound.

A similar charge is then made as to each of the other alleged conspirators, namely, that "each of the conspirators aforesaid commenced on or about the first day of January, 1891, to do and perform their respective parts in the accomplishment and carrying out of said fraudulent scheme to defraud the United States and continued so to do, as successive contracts were to be let, and were let, in said Savannah district from time to time," specifying as follows:

15. "In the suppression of competition in the letting of contracts."

16. "In the obtaining of the contracts in the name of some one of the conspirators or some other person or corporation for the benefit of said conspirators at high, exorbitant and fraudulent prices."

17. In putting into the construction, under the contract, poor, cheap and inferior material, not in accordance with the specifications of the contract.

18. By rendering accounts against the United States for such inferior material and work at the "high, exorbitant and fraudulent prices" named in the contracts, not in accordance with the specifications.

19. In securing the approval and payment of said accounts by Carter.

20. By dividing the moneys paid under these contracts between the conspirators, and concealing knowledge of the same until after Carter was relieved from duty at that post, July 20, 1897.

21. By continuing until this suit to aid and abet each other in the concealment of the moneys so fraudulently obtained.

22. The bill next charges that three different kinds of mattresses were provided for in the specifications, all at the same price, but that the third described mattress was cheapest, and that it was fraudulently intended, from the beginning, to use the third and that the co-conspirators were so informed, but that this information was withheld from other bidders.

23. That certain prices had obtained in that district for this kind of material prior to the letting of these contracts, which were much lower than the prices at which these contracts were let.

24. That these mattresses, prior to 1891, were contracted for by the cubic yard instead of by the square yard, as called for in specifications prepared by Carter, and that the change from cubic to square

yard in the manner in which it was made increased the cost of them to the Government "about 300 per cent."

25. That under contract No. 4572 for Cumberland Sound, let May 4, 1891, Carter so manipulated the specifications as to lead to an award of the contract to John F. Gaynor at the price of 99 cents per square yard for log mattresses and 97 cents per square yard for brush mattresses; which was nearly four times the price prevailing in that district for such material prior to the conspiracy, and that Carter in the exercise of his option in changing the relative amount of different kinds of material that should enter into the work, fraudulently substituted, instead of log mattresses at 99 cents, brush mattresses at 97 cents per square yard, to the great damage of the Government.

26. That in the same way under Contract No. 4637, dated July 20th, 1891, for the building of jetties at Fort Clinch, let nominally to William H. Walsh, but for the benefit of said conspirators, he fraudulently favored the conspirators by awarding the contract at 99 cents per square yard for brush mattresses, a grossly extravagant price.

27. That Carter afterward, during the progress of the work, exercised his option of changing and substituting materials so as to favor the contractors by allowing them to use large amounts of brush mattresses at these extravagant figures.

28. That in contract No. 4820, let to Edward H. Gaynor, September 16, 1892, (erroneously stated in the bill September 16, 1891), Carter, to shut out all competition, so drafted the specifications as to provide for three kinds of mattresses, any one to be called for at his option, all at the same price per square yard. This contract was let at the price of $1.05 per square yard surface measure, which it is alleged is equivalent to $4.20 per cubic yard for brush material in the third design, or 300 per cent. higher than the price which had prevailed in the same lo-

cality, and thereupon during the progress of the work, Carter exercised his option to allow the contractors to use an undue amount of these brush mattresses and allowed and paid them for the same at the extravagant price mentioned.

29. That Carter so framed the specifications for contract No. 4960, let to the Atlantic Contracting Company, October 22, 1892, and known in this record as the "Big Three Million Dollar Contract," for Savannah harbor, as to require bids on the same for three designs of mattresses at one price "as in Contract 4820," with the option reserved to him to determine which kind should be used and to change the relative amount of materials used, which he subsequently exercised in favor of his co-conspirators, and, that this was done with prior knowledge to his co-conspirators that he would thus favor the use of the third and cheapest design, which knowledge was withheld from all other bidders or would-be bidders. Similar allegations are made with respect to other contracts.

30. That Carter so framed the specifications as to allow, accordingly as he might decide, the use of single mattresses, or what are known as multiple mattresses, and that to favor the contractors he allowed them to use multiple mattresses; that is, mattresses piled one on top of the other to the number of eight. Next it is charged that the use of multiple mattresses was cheaper to the contractors, and more expensive, measured by results, for the Government, and that Carter allowed these multiple mattresses to be made of inferior brush and imperfectly constructed fascines, and that they were constructed of the poorest and cheapest and most inferior material which he could allow used without detection of the fraud, and that he approved for payment, and paid, the accounts of said contractors for such inferior work at contract prices.

31. That these contracts were advertised for a shorter time than the law and the interest of the

Government required, for the purpose of giving the conspirators an advantage.

32. That Carter, in further pursuance of said fraudulent scheme, "systematically withheld from applicants therefor * * * the specifications for contracts advertised by him, and delayed and hindered such applicants in obtaining such specifications, etc., * * * to the end that competition with said conspirators in proposals for contracts might be and was suppressed."

33. That Carter by such fraudulent practices "succeeded in awarding at high, exorbitant and fraudulent prices," every jetty contract let by him in said Savannah District from 1891 to 1897, inclusive, to said conspirators, or to some one of them, or to some person or corporation, for their benefit, except one small contract, No. 5359, for Savannah River near Augusta, let to Albert J. Twiggs, July 5, 1893, and as to this one exception, Carter applied such stringent and unfair construction to the specifications as to make the performance of the contract ruinous to the contractor and thus prevented him from any further competition with said conspirators.

34. That Carter, under each and all of said contracts, so fraudulently let "in pursuance of said scheme to defraud the United States allowed the said contractors to put in cheap and inferior material, not in accordance with the specifications in the contracts, and fraudulently exercised in favor of the contractors the options so fraudulently reserved to him in the specifications, as engineer in charge; and that in each of these contracts he, as the engineer officer in charge, in pursuance of said fraudulent scheme, paid, as disbursing officer, the accounts of the said contractors for such work at the high, exorbitant and fraudulent prices so provided in said contracts thus fraudulently let."

35. That the profits arising from the contracts so fraudulently let for the benefit of said conspirators

were divided from time to time between said conspirators.

36. That as to a portion of the net profits arising from contracts fraudulently let prior to the contract, No. 4820, September 16, 1892, the aggregate sum of $16,000 has been "traced with reasonable certainty from the profits of said contracts back into the possession of said Oberlin M. Carter after he had as disbursing officer paid out the same on the contracts. How much more the said Carter may have been apportioned as his share of the profits on said prior contracts is to your orators unknown."

37. That, commencing with contract No. 4820 "the profits amounting to over $2,000,000 on all the aforesaid contracts, so fraudulently let as aforesaid, were divided from time to time between Carter, Benjamin D. Greene and John F. Gaynor, in three equal shares."

38. That the fraudulent profits realized were divided at New York by checks to the respective conspirators, including, each time, an allowance of $75 to pay the expenses of Carter from Savannah to New York.

39. That when Carter could not go to New York to receive there his one-third of the profits, payment of his one-third was made to Robert F. Westcott, his father-in-law, but for his use and benefit.

40. That having divided all their profits, as the work under prior contracts progressed, when the contracts of 1896 were entered into, No. 6515 for Savannah Harbor, and No. 6517 for Cumberland Sound, it was necessary to advance money to provide for their execution, and that Greene, Gaynor and Carter each advanced one-third of the amount necessary for that purpose and that from time to time they made similar advancements until July 1st, 1897, when the appropriation by Congress became available.

41. That Carter approved the accounts rendered by said conspirators in the name of the Atlantic Contracting Company, for large amounts charged for cheap and inferior work, not done in accordance with the contract, and paid them at "high, exorbitant and fraudulent prices" and "did on or about July 6, 1897, pay upon said accounts so approved by him, the sum of $575,749.90" which amount, less deductions for moneys advanced for carrying on the work, "was divided in thirds between the said Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter."

42. That said conspirators have ever since been aiding and abetting each other to conceal all such frauds and payments.

43. That Carter was a poor man prior to the conspiracy of 1891, having nothing on which to live, except his salary, and that he "frequently resorted to borrowing money from Benjamin D. Greene, one of the conspirators whose work he was then supervising," but that after 1891 he "passed from the condition of a borrower to the condition of a capitalist, by the investment of the greater portion of his share of the fraudulent and illegal profits of the contracts so fraudulently let by him" and that these investments "were secretly made by the said Oberlin M. Carter in stocks, bonds, loans and real estate, the particulars of which investments were not known to your orators until within the past year" because of their concealment by Carter.

44. That $16,000 has been traced to Carter from fraudulent profits realized on the contracts of 1891, as heretofore set forth, and that out of this $16,000 he bought bonds to the amount of $13,438.75.

45. That a large number of payments, all set forth in detail, were made to Carter commencing with the profits realized from contract No. 4820 of September 16, 1892, that being the contract for the improvement of Cumberland Sound.

This statement entitled "Statement of the aggre-

gate of thirds of divisions and of the aggregate of investments held by Carter at corresponding dates," gives exact amounts and exact dates, and although the proof shows it to have been in large part mere reckless and unreliable invention, purports to be as accurate as though drawn from the record of an expert bookkeeper. It is as follows:

Number and dates of Division		Aggregate of Thirds Exclusive of $1,575, Arbitrary allowance Carter's Trips to New York.	Aggregate of Investments at Cost.
Number.	Date.		
	1893.		
2	Jan. 3	12,900 04	14,320 00
3	Feb. 10	28,900 04	23,670 00
4	Mch. 13	44,900 04	46,526 25
5	Apl. 14	65,618 15	66,282 50
6	May 8	80,618 15	66,391 25
7	June 5	93,118 15	79,053 75
8	July 11	129,118 15	127,816 25
9	Aug. 7	142,118 15	127,816 25
10	Sept. 6	166,418 15	140,641 25
11	Oct. 10	178,418 15	163,591 25
12	Nov. 6	184,418 15	175,947 50
13	Dec. 4	205,418 15	182,128 75
	1894.		
14	Jan. 8	221,918 15	193,766 25
15	Feb. 5	239,918 15	214,337 50
16	Mch. 5	247,918 15	233,033 75
17	July 9	277,536 02	241,237 50
18	Sept. 10	419,586 02	241,237 50
19	Oct. 5	440,586 02	294,142 50
20	Nov. 12	450,586 02	341,919 50
21	Dec. 11	458,865 93	431,453 75
	1895.		
22	Jan. 17	468,507 59	441,453 75
23	Feb. 4	478,507 59	441,453 75
24	Mch. 5	485,578 47	441,453 75
25	Apl. 8	508,886 80	453,153 75
26	May 22	517,981 82	466,760 00
27	June 7	536,725 63	463,690 00
28	July 5	582,256 32	493,798 75
29	Aug. 5	589,666 31	493,798 75
30	Sept. 3	589,802 91	493,798 75
	1896.		
31	May 12	595,836 35	561,471 50
	1897.		
32	July 6	722,528 02	690,301 85
			Aug. 6, 1897.

46. That what is known in this case as the Eighth avenue property was purchased for the sum of $39,763.75 by his father-in-law, Westcott, and conveyed to him by Westcott and wife January 7, 1895; that this property was bought out of the profits that had been illegally paid to Carter, or to Westcott for his use and benefit, and that in consequence Carter took title to said property "under the implied trust to account to your orators for the same."

47. That what are known in this record as the Beirne Gordon notes, given Westcott for a loan of $10,000 to Gordon, with a life insurance policy deposited as collateral security, were Carter's notes and that Westcott acted for Carter and loaned Gordon not his own money but Carter's money.

48. That the purchase of the property at Orange, New Jersey, for the sum of $63,020.35, made by Westcott, was made with money advanced by Carter and that the money so paid was a part of the profits Carter had illegally derived in pursuance of the conspiracy, and that the title to Carter under the deed made to him January 25th, 1897, by Westcott and wife to said property is held by him under an implied trust for the benefit of the government.

49. That there were other large amounts of bonds, stocks, and notes described in Exhibit E, a part of the same "out of the territorial jurisdiction of this court or otherwise concealed or converted into other property," etc., but all held "by those holding the same with notice of the fraud under the implied trust to account for the same to the government," all the same having been purchased by or for Carter out of proceeds fraudulently derived from said contracts. In support of the foregoing charge the bill then specifies that large amounts of the stocks and bonds and notes were traced to I. Stanton Carter, the brother of O. M. Carter, and to Lorenzo D. Carter, the uncle of O. M. Carter. The bill charges that these transfers were made to these relatives of Carter that they might hold the same in concealment

from the Government, and that they had knowledge of all the frauds that had been practiced as set forth in the bill, and therefore hold the same with notice.

50. That the sum of $23,000.00 borrowed on the Eighth avenue property from the American Mortgage Company of New York, was loaned by that company with full knowledge, and with notice of the government's rights in said property, but that a suit is pending with respect to the same in the Circuit Court of the United States for the Southern District of New York, by which court all questions with respect to the same will be settled.

There are other detailed statements in the bill as to transactions of I. S. Carter and L. D. Carter, to which it is not deemed necessary to call attention in this connection.

51. The next charge is that Carter, learning in 1897 that General John M. Wilson, the then new Chief of Engineers, was intending to change engineer officers at the different posts, "succeeded in causing himself to be appointed as military attache to the Court of St. James, and also a member of the Nicaraugua Canal Commission," and thereupon he was succeeded by Capt. Cassius E. Gillette.

52. That two weeks after taking charge of the Savannah District Gillette discovered irregularities in the administration of Carter of "the gravest character."

53. That a large number of official files and documents of the office had been packed up in a file case by Carter with private papers, preparatory to shipment, but that the box in which he had placed them was detained, and the contents were found to be of an incriminating character, and that thereupon Captain Gillette took steps that led to the appointment of a Board of Inquiry.

54. That in the meanwhile Carter "hurried back from England, arriving in New York early in September, 1897;" that he "expected to be arrested, and

took out of his safety deposit box securities of the cost value of $414,437.50, which he had there, constituting a part of the investments described in Exhibit E which he had made from his share of the illegal profits of the contract as aforesaid, and turned them over to the said Benjamin D. Greene and John F. Gaynor at the Hoffman House for safe keeping."

55. That "these securities were in a day or two delivered by said Benjamin D. Greene to the said Robert F. Westcott for safe keeping for said Carter, and that Westcott placed them in his safe deposit vault."

56. That a few days later when the newspapers gave publicity to the charge against Carter, Westcott "upon the advice of his counsel and in the presence of his counsel, delivered back to Carter all of the aforesaid securities, and took Carter's receipts, dated respectively October 11, 1897, and October 29, 1897."

57. The next charge or specification is that when the Court of Inquiry commenced its proceedings in Savannah September 21, 1897, the box of special files and private papers was opened and "a large mass of incriminating evidence" was found therein, tending to show the conspiracy as charged, and also showing Carter's personal income and expenditures, and Carter "in order to explain his possession of said securities and his spending of the income from the same, caused the said Benjamin D. Greene and said John F. Gaynor to come before said Board and make statements in his presence to the effect that neither the said Oberlin M. Carter nor the said Robert F. Westcott had been in any way beneficially interested in any of said contracts," and that the "large income so spent by said Carter from securities was from gifts given him by the said Robert F. Westcott," to whom the securities belonged and in which Carter had no interest; and that this investigation resulted in a recommendation by the Board of Inquiry that a Court Martial be convened

"to try Carter on the charge, among other things, of conspiracy with the said Benjamin D. Greene, John F. Gaynor and others to defraud the United States as hereinbefore set forth, although at that time the details by which the said conspiracy was carried out and the money divided between the conspirators as hereinbefore set forth was not fully known."

58. That Carter and Greene both falsely testified before the Court Martial that neither Carter nor Westcott had any interest in any of the contracts, and that Carter "endeavored to induce the said Robert F. Westcott to appear before the said Court Martial and testify falsely to the same effect," but that Westcott refused to do so and went to Europe to escape being compelled to do so; that Carter did, however, induce his brother-in-law, Robert E. Westcott, to appear before said Court Martial and testify in his behalf as to said Robert F. Westcott having given money to said Oberlin M. Carter.

59. Then follows a statement to the effect that because the Court Martial had no power to compel civilian witnesses to testify, or produce books or papers, the Government was unable at that time to trace or locate funds and show divisions of the same between the conspirators, as charged.

"Yet nevertheless the evidence of conspiracy to defraud the United States entered into between the said conspirators in the letting of the contracts and in the doing of the work under them and the possession by Carter of so large an amount of securities from which he was enjoying the income, without any satisfactory explanation, furnished proof so plain of the guilt of said Oberlin M. Carter that he was convicted by said Court Martial, and sentenced to dismissal from the Army, and to pay a fine of $5,000 and be imprisoned at hard labor for five years."

60. That subsequently, namely, September 29th, 1899, the President approved the finding and sentence, and that Carter was thereupon imprisoned in

the penitentiary at Fort Leavenworth, Kansas, and that subsequently Greene, the Gaynors, and Connolly and Carter were all indicted by the grand jury for the Southern District of Georgia, and thereupon Greene and the Gaynors were arrested in New York on warrants issued by John A. Shields, United States Commissioner for the Southern District of New York, based upon said indictment, and that thereupon certain proceedings were had as to whether or not they should be released or should be held under arrest and produced before the court in the State of Georgia, resulting in an order for the removal of the defendants to the State of Georgia for trial. The bill then sets forth that in connection with this investigation the Government was enabled to "obtain a large amount of documentary and other evidence from banks, brokers and others, unknown to your orators until then, demonstrating the division of the fruits of the said fraudulent scheme between the said conspirators as set forth in this bill."

61. That said Robert F. Westcott having returned to the United States, "and the case against his son-in-law Carter having been ended by his imprisonment under sentence in the penitentiary, expressed his willingness to testify as against the other conspirators to the facts within his knowledge and turn over to the Government all his checks, check books, and documents bearing upon questions in issue. This the said Westcott did, and it was found by the Government's expert accountant [Edward Israel Johnson] as testified to at said hearing, that while a considerable part of the proceeds of said divisions of the profits of said contracts had passed through said Westcott's hands, and while a large part had been handled through banks, in Westcott's name under powers of attorney held by said Carter, that said Wetscott had retained no part of same, but that the same, or the investment of the same almost immediately after division, found its way into the possession of said Oberlin M. Carter, who proceeded to enjoy the income therefrom."

Then follows the prayer of the bill for a receiver to take charge of the property, and for a decree in favor of the Government with respect to the same, providing for delivery, conveyance, etc., and for general relief.

Oberlin M. Carter, Lorenzo D. Carter and I. Stanton Carter each filed a demurrer to the bill, but before it was heard and disposed of, the stipulation of November 6, 1901, was entered into; of which a copy will be found in the opinion of the Circuit Court of Appeals, printed herewith as a part of the appendix, at pages 13419-21 hereof.

Thereupon, the demurrers were dismissed by agreement and each of the Carters filed an answer to the bill.

ANSWER OF OBERLIN M. CARTER.

Oberlin M. Carter, in his answer, denied generally and specifically each and all of the charges and specifications of fraud and irregularity and improper conduct charged against him in the bill. That is to say, he denied that he had ever entered into any conspiracy, such as was charged, or into any other kind of conspiracy with anybody about anything. He denied that he ever had any kind of an agreement or understanding in pursuance of which he was to favor, in the slightest degree, his alleged co-conspirators or anybody else. He denied that there was any irregularity or indefiniteness in the specifications prepared by him, or that they were prepared in such a manner as to mislead any bidder, but averred that on the contrary they were regular, usual, clear and easily understood, and that they were in fact understood by every bidder or would-

be bidder, and by every one who had occasion to read them, and that, in addition they were, as the law and practice required, approved by his superior officers, the Division Engineer and the Chief Engineer at Washington, at that time, General T. L. Casey. He denied specifically that there was anything irregular or unusual in the advertisements for bids under these specifications, and averred that the advertisements were in all cases usual and sufficient and that no one had ever complained that they were otherwise. He denied that there was any favor shown his alleged co-conspirators, or anybody else in connection with the bidding, and averred that everything done in that behalf was regular and that the contract was awarded in each case to the lowest bidder. He denied generally and specifically that there was anything lax or in the nature of a neglect of his duty in connection with the construction of the work, and denied that any inferior material was furnished or accepted or used, or paid for, and averred that on the contrary, the material employed was of the quality called for in each case by the specifications and by the contract; that the work was vigorously prosecuted; that it was successful beyond expectation, and that it still remains without any impairment whatever; that the results on account of its successful character were creditable to him, as an engineer officer, in the highest degree, and that he received great praise and commendation on account of it from his superior officers and everybody who had any connection therewith outside of this case. He denied that any money was paid to the contractors except what they were entitled to receive

in accordance with their contracts, and denied that any money was misapplied or misappropriated by him, and averred that on the contrary he approved no accounts and paid out no money except in strict compliance with the respective contracts under which payments were made, and that every cent of money intrusted to him for disbursement has been fully and faithfully accounted for. He further averred, as a conclusion from all these facts, that the contractors did what they undertook to do; that the Government received in consideration of the payments it made what it contracted to get, and that the Government has not been in any way wrongfully deprived of any money. He denied that while in charge of said work he ever borrowed any money from Benjamin D. Greene, or from any other contractor with the United States, or that he received any benefit or advantage or gift or gratuity from any of said contractors, either directly or indirectly, and denied that he advanced any money on account of the contracts, number 6,515 and 6,517, or that any money was paid or repaid to him on that account, or that on any account he ever derived any money from said contractor or any other contractors.

He denied that "there was ever any division, directly or indirectly, of any money or anything else by thirds or on any other basis between this defendant and Benjamin D. Greene and John F. Gaynor, or between this defendant and either said Greene or said Gaynor."

And denied "that he has ever received or had, directly or indirectly, in himself, or through any other person or corporation, any interest or beneficial ad-

vantage in or to any of the contracts mentioned in said bill of complaint or in any of the proceeds thereof, or that he ever received or had any of the proceeds of any of said contracts, or ever received or had any money or property or valuable consideration by reason of the making or carrying out of said contracts or that he ever received or had from any of the contractors, directly or indirectly, any money, property, benefits, advantage or considerations."

He denied, "as a whole and denies in every part, both generally and in detail, that he ever conspired to do, or attempted to conspire to do, or that he ever did or attempted to do, or discussed doing or ever thought of doing, either alone or in connection with others, or ever aided or advised or permitted others to do or attempted to do, or even knew of others doing or attempting to do or discuss or conspire doing or attempting to do all or any of the acts or things or any part of any thereof, which are described in said bill of complaint."

In short, every allegation of the bill, material and immaterial, that charged fraud or wrongful action of any kind on the part of Carter was explicitly denied.

Requisite Proof.

It will be seen from the issues joined that the case was not only a suit for equitable relief on the ground of fraud, but as in all such cases on the ground of the particular fraud specified and set forth in the bill.

Some well known rules and principles are applicable.

In the first place, "Epithets do not make out fraud" (144 U. S., 91); it must be proved; and in the second place, not only must fraud be proved, but it must be the particular fraud set forth in the bill. To prove some other fraud or some other ground for equitable relief would not be sufficient.

"*Probata et allegata* must agree."

10 Peters, 177.

In the case of *Dashiel* v. *Grosvenor*, 66 Fed. Rep., 334, Judge Goff, speaking for the Circuit Court of Appeals said (page 339):

> "A court of equity will not grant a decree on any other ground, where the bill charges actual fraud as the ground of relief, and the fraud is not proven. We find that there is an utter failure to sustain the allegations of fraudulent conspiracy and confederation charged in the bill. * * *
>
> The charges of fraud have been made either under an entire misconception of the facts or with a recklessness that, at least, is not commendable, and should not be encouraged by an endeavor on the part of this court to relieve the complainants of the embarrassment caused thereby by holding that they are entitled to a decree founded on some general ground of equity jurisdiction, not specially pleaded, but supposed to be included in the prayer for general relief. While equity will always relieve those who suffer from acts of fraud, it has also always required that those who seek its jurisdiction on that account shall, after having carefully scrutinized the cause of complaint, most clearly formulate the allegations of the same, and then that they shall fully prove that which they have so alleged."

Judge Goff cites in support of what he says a

number of cases, among them the case of *Tillinghast* v. *Champlin*, 4 R. I., 173, in which case the court uses the following language (p. 340):

"In most all these cases it will be found that the objection to relief was not that the bill did not contain allegations sufficient to afford a basis for the inferior or secondary relief upon which the plaintiff wishes to fall back, but that, having mingled with those allegations imputations of personal corruption or actual fraud, he has pointed his bill only to relief upon this higher ground, and must therefore succeed upon that ground, or not at all.

A party is not allowed to state one case in a bill or answer, and make out a different one by proof, the *allegata* and *probata* must agree; the latter must support the former."

"In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged but not proved."

Boone v. *Chiles*, 10 Pet., 178.

Hoyt v. *Shelden*, 66 U. S. (1 Black), 518.

Harrison v. *Nixon*, 34 U. S. (9 Pet.), 483.

"In equity, the proofs and allegations must correspond. The examination of the case by the court is confined to the issues made by the pleadings. Proofs without the requisite allegations are as unavailing as such allegations would be without the proofs requisite to support them."

Rubber Co. v. *Goodyear*, 76 U. S. (9 Wall.,) 793.

"It is a well settled rule that fraud is not to be presumed, but must always be proved."

Fleming v. *Slocum*, 18 Johns., 403; 9 Am. Dec., 224.

"Fraud is never presumed, but must be clearly proved in order to entitle a party to relief on the ground that it has been practiced on him."

Davidson v. *Crosby*, 68 N. W. (Neb.), 338.

It is especially fitting that the complainant's case should be measured by the requirements set forth in these rules and the authorities cited in their support, for the reason that it is shown by the record that the bill of complaint was not brought against Carter until after the investigations of the Board of Engineers; after the trial before the Court Martial; after the review of the evidence before the Court Martial had been made by ex-Senator Edmunds, Attorney General Griggs and President McKinley; after the removal proceedings before Commissioner Shields, and after Carter had been cashiered and imprisoned;—after, in short, the Government had repeatedly had the most ample opportunity to learn the truth about all the numerous allegations it saw fit to set forth in its bill. Recklessness of statement is always inexcusable, but particularly so under the conditions and circumstances that obtained when this suit was commenced. But while mere recklessness, particularly under such circumstances, would be sufficient to warrant a denial to the complainant of all right to seek to recover on any other ground or because of any other facts than those alleged in the bill, much more is it true that there should be such denial when the allegations set forth are not only shown to be reckless and untruthful, but so clearly so as to indicate malicious wilfulness.

With all this in mind, attention is now called especially to the first and second assignments of errors.

They read as follows:

First Assignment of Error.

(1)

"That the court in and by its final decrees of March 18, 1909, committed error in not dismissing the bill of complaint and rendering judgment in favor of this cross-appellant, defendant below, for his costs and other appropriate relief, because of a failure of the testimony to prove the essential facts charged in the bill as a ground for the relief prayed for against him by the United States; *i. e.*, the bill alleges that prior to January 1, 1891, this cross-appellant, acting as supervising engineer for the Government, entered into a conspiracy with the contractors named in the bill to defraud the United States, and that the scheme of the conspirators involved on his part the irregular and fraudulent framing of specifications for the work to be done, irregular and insufficient advertising for bids, wrongfully withholding from distribution among prospective bidders notices and copies of specifications for the purpose of suppressing competition in bidding, secret giving out of information to the alleged co-conspirators to enable them to have unjust and illegal advantage over other bidders, and wrongful discrimination in the awarding of contracts: The bill further charges that in pursuance of such conspiracy all the foregoing wrongful steps were taken by this cross-appellant and that in further pursuance of said conspiracy he wrongfully and to the damage of the United States exercised the rights, after the award and during the progress of the work, reserved to him by the specifications to change the relative

proportions of the materials employed in the construction of the works, and substituted for log mattresses a large amount of brush mattresses which the bill alleges were a cheaper and poorer material but more expensive to the United States, to the great gain and benefit of the contractors, and corresponding damage to the United States, and that he with knowledge of all these facts wrongfully approved the claims from time to time presented as the work progressed by the contractors against the United States for work done by them under their several contracts, and wrongfully and with full knowledge disbursed large amounts of moneys belonging to the United States in payment of such claims.

But the evidence shows conclusively, and both the Circuit Court and the Circuit Court of Appeals upon the evidence found, that no such conspiracy as that charged in the complainant's bill was ever entered into at any time, and that no one of the things mentioned as done by this cross-appellant in pursuance of such conspiracy was done; both of said courts found not only that there was no conspiracy, prearranged plan or agreement of the nature charged in the bill, but also found specifically and affirmatively that the specifications were in regular and approved form; that the advertisements were legal, regular and sufficient; that no information was withheld from prospective bidders for the purpose of suppressing competition or for any other wrongful purpose, or at all; that no information was secretly given to the alleged co-conspirators or anybody else to give them advantage over other bidders; that there was nothing irregular or improper in connection with the awards of the several contracts, but that they were regular and to the lowest bidders; that no contracts were ever entered into except in pursuance of written instructions from the Chief of Engineers, and

that all contracts were approved in writing by the Chief of Engineers before they became effective; that in changing the relative proportions of materials called for by the specifications to be used in the work after the awards were made and the work was in progress, this cross-appellant acted in accordance with his rights reserved under the specifications and in the exercise of a sound discretion, and that the changes he so made were wise and necessary under the circumstances and in view of the situation and facts that were developed as the work progressed, and that the brush mattresses used were not a poorer and less useful material, but a better material and cheaper to the United States, and that the result was such as to make the work when completed successful beyond precedent or expectation, and that the total cost of the work, largely on account of the use of brush mattresses, was brought within the estimates and appropriations therefor, and that no claims for work done under said contracts were approved by this cross-appellant for said contractors except in strict conformity to the provisions and requirements of the contracts, and that no money of the United States was paid by this cross-appellant to the contractors or anybody else except in accordance with the terms of the contract and for work actually, properly and wisely done."

Second Assignment of Error.

(2)

"That the court in and by its final decrees of March 18, 1909, committed error in not dismissing the bill of the United States and rendering decrees and judgment for costs in favor of this cross-appellant, because of a fatal variance between the material allegations in the bill and

the proof, in this: the bill alleges, as set forth in the preceding assignment of error, specific facts showing a conspiracy to defraud, entered into 'on or about the year 1891,' the several steps to be taken in the execution of such conspiracy, and alleges that the said several steps were taken by this cross-appellant in pursuance of such conspiracy for the purpose of aiding his co-conspirators in carrying out their scheme to defraud the United States, and that by reason of such conspiracy and execution of the same the United States was defrauded of large sums of money; whereas, the proof shows, as found by both the Circuit Court and the Circuit Court of Appeals, that the testimony failed to establish the conspiracy charged and likewise failed to establish that this cross-appellant performed any of the acts which the bill charges were to be and were in fact performed by this cross-appellant in pursuance of such conspiracy, and that while the Circuit Court found explicitly there was an utter failure to show that any such conspiracy was ever at any time entered into, the Circuit Court of Appeals found as follows:

'We concur, therefore, in the view expressed in the opinion filed by the trial judge that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders or letting of contracts, (c) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances.' (Rec., 13,425.)

The Circuit Court of Appeals on that point further found as follows:

'Whether the parties conspired to that end

[to defraud the United States] at or prior to the letting of the contract of 1892, can neither be ascertained from the testimony nor is such inquiry deemed material upon this issue.' (Rec., 13,426.)

And the court concluded its observation on this point as follows:

'We believe the inference of fact to be inevitable that Captain Carter connived with these parties [the contractors] in thus defrauding the United States.' (Rec., 13,427.)

In other words, both courts found that the testimony failed to establish any such conspiracy as that charged in the bill, and found in favor of this cross-appellant, as to the specific facts alleged to have been done by him in pursuance of such alleged conspiracy, and the nearest approach to a finding that there was such a conspiracy was by the Circuit Court of Appeals that it might be deduced and inferred from a train of circumstances and suspicions that, after December, 1893, this cross-appellant connived at frauds that may have been perpetrated by the contractors and others in making large profits under the contracts, but that there was no actual proof of such connivance.

This failure to establish conspiracy exempts this cross-appellant from responsibility for anything that may have been said or done by any of the alleged co-conspirators in alleged pursuance of such alleged conspiracy, and from all responsibility on account of any alleged chain of 'circumstantial evidence' consisting of acts done without his knowledge by his alleged co-conspirators, or any of them."

ARE THESE ASSIGNMENTS JUSTIFIED BY THE PROOF?

With these authorities and assignments of error in mind, the next question is as to whether the recitals of the assignments are justified by the proof.

This shows that:

1. THERE WAS NO CONSPIRACY.

The Circuit Court said with respect to the alleged conspiracy that "limited as above stated, under the rule of evidence obtaining in such case, the Government has failed to maintain its case." (Rec., 380.)

The Circuit Court of Appeals affirmed this finding of the Circuit Court, saying:

> "We concur, therefore, in the opinion filed by the trial judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to, is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (c) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances." (Rec., 13425.)

"The chain of circumstances" will be considered presently.

2. THE SPECIFICATIONS WERE REGULAR IN FORM AND CLEAR IN THEIR PROVISIONS.

The testimony of George Y. Wisner an experienced civil engineer (Rec., 2625); Colonel Thomas H. Handbury, corps of engineers (Rec., 3508); Major F. A. Mahan, corps of engineers (Rec., 3070); J. W. Rutherford, a civil engineer and a competitor of the contractors (Rec., 3238); A. R. Stewart, a competitive contractor (Rec., 653); James A. Bryan, a competitive contractor (Rec., 1034); John L.

Grim, a competitive contractor (Rec., 1008); C. P. E. Burgwyn, a civil engineer and a competitive contractor (Rec., 12938); all show that the specifications were clear and plain, and both courts so held. (Rec., 363; 13425.)

3. THE ADVERTISEMENTS WERE LEGAL AND PROPER.

That the advertisements were legal, regular and sufficient is shown by the testimony among others of Gen. W. P. Craighill, chief of engineers (Rec., 3426; 3415); General W. L. Marshall, now chief of engineers (Rec., 3174); Colonel J. H. Willard, corps of engineers (Rec., 3091); Colonel C. McD. Townsend, corps of engineers (Rec., 2967, 2941); Major F. A. Mahan, corps of engineers (Rec., 3052); L. Y. Schermerhorn, a competitive contractor (Rec., 3444); P. Sanford Ross, a competitive contractor (Rec., 3762); George Y. Wisner a civil engineer (Rec., 2607); and the trial court held:

> "The record makes it very plain that Carter in this respect did not depart from the usual course obtaining in like cases. * * * There is nothing inherent in the matter of notice which suggests any fraudulent intent. If there was any improper notice or means employed it must be found outside the mere matter of giving the notice." (Rec., 364.)

The Circuit Court of Appeals in affirming the findings of the Circuit Court expressly says there was nothing wrong in the "advertising for bids." (Rec., 13425.)

4. NO INFORMATION WAS WITHHELD FROM PROSPECTIVE BIDDERS.

That no information was withheld from prospective bidders is shown by the testimony among others of P. Sanford Ross, a competitive bidder (Rec., 845; 12922); C. C. Ely, another competitive bidder (Rec., 659); W. F. McCauley, another competitive bidder and a witness for the complainant (Rec., 1013); C. P. E. Burgwyn, another competitive bidder (Rec., 12933); L. Y. Schmerhorn, another competitive bidder (Rec., 12425) J. W. Rutherford, another competitive bidder (Rec., 3156); A. R. Stewart, another competitive bidder (Rec., 650); James A. Bryan, another competitive bidder (Rec., 1034); Jacob Friday, another competitive bidder (Rec., 995); John L. Grim, another competitive bidder (Rec., 1009 and 13074); Roderick G. Ross, another competitive bidder (Rec., 8794); and the Circuit Court held that information was not withheld from prospective bidders, saying specifically that competitive bidders were furnished with the information given to Greene and Gaynor (Rec., 366); and saying further "there seems to be little ground for complainant's contention in that behalf." (Rec., 366.)

The Circuit Court of Appeals in affirming the finding of the Circuit Court finds there was nothing wrong in the "treatment of proposed bidders" (Rec., 13425).

5. ALL CONTRACTS WERE AWARDED TO LOWEST BIDDERS AND ALL AWARDS WERE REGULAR.

There is no contention that any contract was ever awarded to any but the lowest bidder, nor that any contract was ever executed unless approved in writing by the chief of engineers, and the evidence shows that the contracts were honestly and openly awarded. Major Thomas H. Rees testifies directly to this effect (Rec., 2841; 12316); and so do the unsuccessful bidders such as P. Sanford Ross (Rec., 3760-3), L. Y. Schermerhorn (Rec., 3447; 12432); W. F. McCauley (Rec., 2025; 2036-40); and the Circuit Court held "There is nothing in the record with regard to the opening and letting of the bids in and of itself calculated to cast suspicion upon Carter's conduct" (Rec., 368).

The Circuit Court of Appeals in affirming the finding of the Circuit Court expressly holds there was nothing wrong in "letting contracts" (Rec., 13425).

6. CALLING FOR BIDS ON THREE DESIGNS OF BRUSH MATTRESSES WAS PROPER.

That it was proper for the specifications to call for three designs of mattresses at the same price per square yard is shown by the testimony of Colonel W. M. Black, corps of engineers (Rec., 693; 2564); Colonel D. D. Gaillard, corps of engineers (Rec., 725); Colonel F. V. Abbott, corps of engineers (Rec., 811), Major F. A. Mahan, corps of engineers (Rec., 3061); George Y. Wisner, an experienced civil engineer (Rec., 2625); L. Y. Schermerhorn, an experienced civil engineer (Rec., 12428); Lyman E. Cooley, an

experienced civil engineer (Rec., 8542); J. W. Rutherford, an experienced civil engineer and contractor (Rec., 12889); C. P. E. Burgwyn, an experienced civil engineer and contractor (Rec., 12939); P. Sanford Ross, a competitive contractor (Rec., 3766; 12919); A. R. Stewart, a competitive contractor (Rec., 653); James A. Bryan, an experienced contractor (Rec., 1034); E. L. Friday, a competitive contractor (Rec., 996), and R. G. Ross, a competitive contractor (Rec., 1019), and the Circuit Court found "There was nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same when considered with reference to the fact that different kinds of work might require different designs on the same contract. Of itself, it discloses no evidence of a conspiracy to defraud nor does it tend to do so" (Rec., 365).

The Circuit Court of Appeals in affirming the finding of the Circuit Court as to all "the other several branches of testimony reviewed in the opinion" necessarily held that the contention of the Government could not be upheld on this point (Rec., 13425).

7. MULTIPLE MATTRESSES WERE PROPER AND NECESSARY.

That it was proper to sink mattresses in multiple is shown by the testimony among others of General Craighill, chief of engineers (Rec., 3422); General Marshall, present chief of engineers (Rec., 3168); Colonel T. H. Handbury, corps of engineers (Rec., 3507), Colonel W. H. Bixby, corps of engineers (Rec., 8508); General William Ludlow, corps of engineers (Rec., 3004); Major F. A. Mahan, corps of engineers

(Rec., 3056); Colonel J. H. Willard, corps of engineers (Rec., 3131); Colonel W. T. Rossell, corps of engineers (Rec., 2999); Colonel C. McD. Townsend, corps of engineers (Rec., 2949; 12239); Major T. H. Rees, corps of engineers (Rec., 2847); and many other engineers and contractors, and the trial court held that the use of such mattresses was not only authorized by the contract but that "It seems clear from the evidence that the introduction of multiple mats into the works on the Savannah harbor was judicious and essential" and that "there seems to be little ground for questioning the good judgment and skill of the engineer in charge in causing the mats to be put together and used in "multiple form." (Rec., 373.)

The Circuit Court of Appeals in affirming the finding of the Circuit Court as to all "the other several branches of testimony reviewed in the opinion," necessarily held there was nothing wrong in this respect. (Rec., 13425.)

8. THE PURCHASE OF BRUSH MATTRESSES BY THE SQUARE YARD INSTEAD OF THE CUBIC YARD WAS USUAL, RIGHT AND LEAST EXPENSIVE TO THE GOVERNMENT.

That the purchase of mattresses by the square yard instead of by the cubic yard, as complainant charges should have been done, was not only right but was the usual mode of purchase is shown by the testimony among others of Colonel W. H. Bixby, corps of engineers (Rec., 8497-8508); General W. P. Craighill, chief of engineers (Rec., 12220), and many other officers of the corps of engineers, civil engineers and contractors, and the trial court held:

"Until Carter pursued this method it is asserted mats had always been purchased by the cubic yard. *This does not seem to be justified by the evidence.* Mats had been paid for by the square yard by Colonel Black in 1888 and 1890; Colonel Bixby 1889 and 1890, Captain Carter 1891 and Colonel Stanton 1892. Whenever mats to any considerable amount were required they were purchased by the square yard." (Rec., 368.)

The Circuit Court further held that by purchasing mattresses by the square yard instead of by the cubic yard there was no increase in cost of 300% as alleged, but on the contrary that Carter saved to the Government the difference between the contract price of 95c per square yard and the $1.19 which it would have cost if the purchase had been made by the cubic yard as complainant contends should have been done. (Rec., 371.)

The Circuit Court of Appeals in affirming the finding of the Circuit Court as to all "the other several branches of testimony mentioned in the opinion" necessarily held that this purchase by the square yard was a proper method of purchase. (Rec., 13425.)

9. INCREASED USE OF BRUSH MATTRESSES, AUTHORIZED, PROPER AND NECESSARY.

That it was right for Carter to increase the amount of brush mattress work and decrease correspondingly the amount of other work is shown by the testimony of General W. P. Craighill, chief of engineers (Rec., 3438); Colonel T. H. Handbury, corps of engineers (Rec., 3505); General William Ludlow, corps of engineers (Rec., 3008); General W. L. Marshall,

present chief of engineers (Rec., 3178); Colonel W. H. Bixby, corps of engineers (Rec., 8681); Colonel F. V. Abbot, corps of engineers (Rec., 815); Lyman E. Cooley, an experienced civil engineer (Rec., 8541; 8560); and many other engineers and contractors, and the trial court expressly holds that Carter by so doing "was thus able to keep within the estimate of cost of the whole and within the appropriation while at the same time he accomplished the results sought for." (Rec., 369.)

The Circuit Court of Appeals in affirming the finding of the Circuit Court expressly holds that Carter had authority under the contract "to make such changes in the interests of the Government" and that such changes were "effective for a great work in the improvement of harbors" (Rec., 13423), and that court held that:

> "The discretion vested in the officer in charge was rightly exercised in greatly extending the mattress work instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene and Gaynor contract)" (Rec., 13426).

10. CARTER'S WORK UNDER ALL THE CONTRACTS, BUT ESPECIALLY THE WORK UNDER THE "BIG CONTRACT" 4960, FOR THE IMPROVEMENT OF SAVANNAH HARBOR, WAS SUCCESSFUL IN THE HIGHEST DEGREE.

The work done at Savannah under contract 4960, *i. e.*, the "big contract of 1892," is stated by the Circuit Court to be "typical of all the contracts" (Rec., 359), and by the Circuit Court of Appeals to be "the main subject of controversy" (Rec., 13423).

That the work done was a great success is shown by the testimony of General W. P. Craighill, Chief of Engineers, who testifies:

> "It is one of the most successful operations of which I have any knowledge either in this or in any country" (Rec., 3424);

and by the testimony of G. Y. Wisner, Director American Society of Civil Engineers (Rec., 2626); L. Y. Schermerhorn, an experienced civil engineer (Rec., 3450); E. A. Gieseler, a civil engineer who was a witness for complainant (Rec., 1329); A. S. Cooper, a civil engineer who was a witness for complainant (Rec., 1210-11); a special Board of Engineers, composed of Colonels C. B. Sears, W. H. Bixby and T. W. Symons (Rec., 4588); C. E. Gillette, the prosecuting witness (Rec., 676); Captains Usina and Fitzgerald, pilots (Rec., 3535; 3538); Lyman E. Cooley, an experienced civil engineer (Rec., 8537-39); Col. J. B. Quinn, corps of engineers (Rec., 4503); etc., and the Circuit Court held:

> "The work was performed by Carter within the appropriation in such a manner as to secure an increase in depth of the channel of Savannah River, two hundred forty feet in width at bottom, from Savannah to the ocean, of twenty-six feet, whereby that city became the second city of the Atlantic coast in the volume of its commerce. This end had long been sought for without avail. The government engineers, almost with one accord, pronounce the work a triumph of engineering skill" (Rec., 359).

The Circuit Court of Appeals, in affirming that finding, says that it was

> "A great work in the improvement of harbors" (Rec., 13423).

11. MATERIAL USED WAS OF PROPER QUALITY AND QUANTITY.

That the material used was of proper quality and quantity is shown by the testimony of the inspectors and foremen who actually were engaged on the construction work, such as Austin (Rec., 3259); Twiggs (Rec., 1161); Conant (Rec., 1621); Cooper (Rec., 1224); Connell (Rec., 3484); Cole (Rec., 3489) Ensey (Rec., 5307); Ford (Rec., 3145; 12946); and many other witnesses.

The only pretense of any evidence to the contrary is with regard to the work done at Cumberland Sound in 1897, from such witnesses as E. B. Parker who in 1897 swore he was never employed where any mattresses were built, and that his only employment was around "a mule lot" and on "one empty lighter" (Rec., 8794-96), but who testified later for Gillette that he was employed on the mattresses and that they were improperly built (Rec., 4438-44); as against such testimony the court says of the witnesses who testified that the work was properly done that: "It is an impressive fact in this case that the defendant is so emphatically endorsed by these men who are above suspicion" (Rec., 379).

To set at rest the claim of the complainant that there was not enough material in the brush mattresses, the actual measurements, admitted to be correct and furnished by the complainant, were taken by Col. W. H. Bixby, Corps of Engineers, as a basis for his computations, and he testified that the contractors placed much more material in each

square yard of those mattresses than the contract required (Rec., 8487-88; 8495-97). No attempt was ever made to contradict his testimony, and the trial judge adopted Col. Bixby's testimony by stating that "the contractors used more material at Savannah and Cumberland Sound than was required of them by their contract" (Rec., 378).

12. NOT ONLY DOES THE EVIDENCE JUSTIFY THE FIRST AND SECOND ASSIGNMENTS OF ERRORS, BUT BOTH COURTS FIND THE FACTS TO BE AS THEREIN RECITED.

These assignments of errors are not only justified by the evidence, but also by the findings of *both courts below* as we understand their opinions; and where both courts below have agreed in their findings of fact, such facts will be accepted by this court as established unless such findings are attacked as plainly or grossly erroneous, and no such attack can be successfully made in this case. (*United States* v. *William A. Clark*, 200 U. S., 601. See also *Dun* v. *Lumbermen's Credit Association*, 209 U. S., 20).

This concurrence of the lower courts to the full extent claimed, is shown by the opinion of the Circuit Court of Appeals, in which, Record, page 13409 to page 13418, both inclusive, is a recital of the findings of the trial judge; this recital of his findings is not only set forth, without any dissent from any one of them, but in addition, the express concurrence quoted in the second assignment of errors is followed (p. 13423), by a statement of the Circuit Court of Appeals of certain findings of its

own, confirmatory of the findings of the trial judge and in no respect in conflict with any of his findings; as, for instance, that the specifications, advertisements, letting of contracts, etc., were in all cases approved by Captain Carter's superiors, and that up to and including the "big contract" of 1892, the contracts were "fairly obtained," and that a large amount of brush mattresses was substituted for other materials, etc. and that "explanations appear in the testimony that it was found to be advantageous for harbor improvements, and its efficiency is upheld by the concurring opinions of many eminent engineers who testify thereupon; so that the foregoing statement" [as to the substitution of the large amount of brush mattresses], "is not to be understood as intimating doubt, either of authority to make such changes in the interest of the Government, nor that such substitutions were not effective for a great work in the improvement of harbors."

In brief, both courts found that there was:

(a) No conspiracy.

(b) No improper specifications.

(c) No improper advertisements.

(d) No withholding of information from prospective bidders.

(e) No giving of secret information to the alleged co-conspirators.

(f) No favoritism of any kind in connection with the letting of any of the contracts, and therefore,

(g) No improper award.

(h) No excessive prices named in the contract; (at least not in the contracts let prior to October, 1893, the date when the extension of the use of brush mattresses commenced under contract 4960 for the improvement of Savannah Harbor; see opinion of the Circuit Court of Appeals, Rec., 13426), but only such prices as were the result of open, free bidding.

(i) That there was no unnecessary or improper substitution of brush mattresses, either single or multiple.

(j) That there was no inferior material or inferior work.

(k) That on the contrary, the work in detail and as a whole was of superior quality and character, and the results surpassed expectation, amounting to an "engineering triumph" to use the language of the trial judge, and to "a great work in the improvement of harbors," to use the language of the Circuit Court of Appeals.

(l) That there was no failure to account for all the money entrusted to Carter for disbursement.

And yet both courts found, notwithstanding all these facts were in favor of Carter, that the Government was entitled to recover as set forth in the decree; according to the trial court, on the ground that Carter must "as a conclusion of law be held chargeable with knowledge of what was being done in the premises," to wit; "that a great wrong was practiced upon the Government by the contractors" through making large profits under their contracts; which, in the opinion of the court, constituted "a

raid upon the Government"; and the Circuit Court of Appeals, "not satisfied that the right of the United States to such a decree" as that entered by the Circuit Court "may rightly rest, as there stated, upon the proposition that Carter must, as a conclusion of law, be held chargeable with knowledge," then proceeded to find him guilty of actual knowledge in the following language, to which careful attention is invited:

> "Under the *settled facts above recited* [those found by the Circuit Court which were 'recited' from (Rec., 13409 to 13418), as well as those found by the Circuit Court of Appeals and 'recited'] however, linked with cumulative evidence, tending to prove actual knowledge on the part of Captain Carter of the excessive profit in the mattress work, and of divisions thereof with Westcott in New York and complicity in the fraudulent transactions, of which (at one time or another) he acquired approximately one-third of the net proceeds, we are constrained to the belief, that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter. Whether the parties conspired to that end at or prior to the letting of the contract of 1892, *can neither be ascertained from the testimony*, nor is such inquiry deemed material upon the issue. With the completion of the mattress work expressly stipulated in that contract [the evidence shows this was October, 1893], it cannot be doubted under the testimony, that Captain Carter, having personal supervision of the work, as an engineer of great experience and ability in harbor improvements, must have discovered the exorbitant profit afforded at the contract price of mattresses, *measured by the square yard*. Assuming, therefore, that the terms contracted for were fairly ob-

tained and believed by him to be reasonable when made, and that the discretion vested in the officer in charge was rightly exercised in greatly extending mattress work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene and Gaynor contract), *no just ground appears for continuing the same terms,* for such extension from 350,000 to 1,363,372 square yards, yielding to the favored contractors another great ratio of excessive profit, *if the unreasonableness of the contract terms was then understood,* or *was readily ascertainable under the circumstances.* This transaction, moreover, was followed up by *the succession of contracts* in evidence, for other improvements in the district of like nature—under the same form of specification and advertisement for bids, to cover alternative structures at a single price as ordered; so that no bid was entertainable for the mattress work alone, which was intended and used in the improvement, *nor was the 'multiple mat' structure* (as used) *mentioned in either notice*—and all were obtained by Greene and Gaynor; all were carried out, measured and accepted alike with the earlier contract work, up to the appointment of a successor to Captain Carter. *The fact alone* of successive contracts thus let to these contractors, *at prices far beyond* the reasonable value of brush mattresses, whereby the United States was plainly defrauded in overpayments approximating $2,000,000—without proof of tenable excuse for the letting, through emergency or other cause —*implies* either participation in benefits or collusion on the part of the officer having direction of the work." (Rec., 13426-27.)

This language indicates that the Circuit Court of Appeals overlooked in this connection the testimony

and its own concurrence in the opinion based thereon, of the Circuit Court, that (a) there was no "exorbitant profit" to the contractors in paying for the brush mattresses by the square yard, but on the contrary a large saving to the government, (See pp. 43-44 hereof); and (b) overlooked the fact that the testimony and the finding of the Circuit Court thereon, concurred in by the Circuit Court of Appeals, is that there is no fraud charged as to any material except brush mattresses, and that the prices paid therefor were the fair market prices obtaining at that time in that district; and (c) also overlooked its own finding, in concurrence with the finding of the Circuit Court, that it was right and proper to use the multiple mattresses; and also overlooked the fact (d) that there was no subsequent letting of "successive contracts" at prices far beyond the reasonable value of brush mattresses, as will presently be more fully shown.

But waiving all this for the moment, this language of the Circuit Court of Appeals properly interpreted must mean that it was the opinion of the Circuit Court of Appeals that because excessive profits (as to the amount of which there is no satisfactory proof) were realized by the contractors on a contract "fairly obtained," the terms of which were fixed by fair and open bidding, and believed by Carter at the time when the contract was entered into to be fair and "reasonable," it became the duty of Carter to ascertain that excessive profits were being realized by the contractors, and to refuse to extend the amount to be used of the material on which the profit was being made, unless the contractors would agree to a modifica-

tion of the price to be paid, although the additional or substituted amount of that material thus used was substituted for other material and work that would have cost the Government as much, if not more, and notwithstanding the fact that such substitution was deemed necessary by Captain Carter to secure satisfactory work and results, and that by the use of the same he did secure such satisfactory work and results, and that it was his duty so to act, although there is not a word of testimony in the case to show that Carter had any knowledge of the cost to the contractors of their labor or the amount of the profits that were being realized, or whether there were any profits at all.

If this be not a new and wholly untenable proposition with respect to the proof of fraud, then the precedents are either misunderstood or meaningless. The language of both courts condensed and concisely stated is that although the contracts were fairly and honestly let, and fairly and honestly performed, yet there is a "chain of circumstances," suspicious in character, on account of which Carter is found by the Circuit Court—(unable to find him a participator or that he had actual knowledge)—as "a conclusion of law," to have had knowledge of the fact that frauds were being perpetrated upon the Government; and by the Circuit Court of Appeals, by *implication* from this same "chain of circumstances" to have had "actual knowledge" of such frauds and to have been guilty either of "participation in benefits, or collusion" (Rec., 13426-7);—which, "participation" or "collusion," cannot be determined.

This indefiniteness, under the rules applicable to the proof of fraud, would seem sufficient to defeat the recovery sought.

In the case of *United States* v. *Clark*, 200 U. S., page 601, this court said with respect to proof of the knowledge of fraud that it must be clear, and that it *would not be "inferred from a merely suspicious circumstance."*

After having rested its finding on the ground that Carter was chargeable, because of the "chain of circumstances," *not* as set forth in the bill, but *generally* with fraud and connivance, the Circuit Court of Appeals then proceeds to state, as though not quite satisfied with the grounds it has thus assigned for such finding, another reason why it "*implies* either participation in benefits or collusion on the part of the officer having direction of the work." (Rec., 13427.)

This additional reason is that Carter enlarged the use of brush mattresses on the big contract of October 22, 1892, after he should have known the contractors were realizing excessive profits on them, without any effort to make the contractors agree to a modification of the contract price. and that he let other contracts after the date when he should have had knowledge of such excessive profits "under the same form of specification and advertisement for bids," etc., "and all were obtained by Greene or Gaynor, all were carried out, measured and accepted alike with the earlier contract work up to the appointment of a successor to Captain Carter." (Rec., 13426-27.)

How Captain Carter could compel a modification of

the terms of the contract in the way suggested is not plain; and if the specifications, advertisements, bids and awards were regular as to the earlier contracts, as both courts found, then it would seem to follow that they must have been the same as to the additional or subsequent contracts, and that he might continue to follow and use them, with the approval of his superior officers, without liability to criticism.

The Subsequent Successive Contracts.

But a further answer is found in the fact, apparently overlooked by the Circuit Court of Appeals, that there were only four of these "subsequent" contracts entered into after the date when that court held that Captain Carter should have had actual knowledge of excessive profits.

To be more specific, the only contracts calling for brush mattresses let subsequent to the date when the court says Carter ought to have known the profits of the contractors were excessive were:

#5811 November 15, 1894, Cumberland Sound.
#6049 April 20, 1895, Darien Harbor, etc.
#6515 October 8, 1896, Savannah Harbor.
#6517 October 8, 1896, Cumberland Sound.

Under contract # 5811, November 15, 1894, the price was only 57 cents per square yard, as against 95 cents at Savannah in 1892, and below what Col. Black testified that such mattresses actually cost in the adjoining district (Rec., 698), yet Carter made the contractors use 213,334 square yards of mats at this low price, although only 50,000 square yards had been named in the

specifications; under contract #6049, April 20, 1895, the price was $1 per square yard, and Carter used only 13,898 square yards, which was about one-half of one per cent. of the total mattresses in controversy in all these suits; while under contract #6515, October 8, 1896, the price was 95 cents per square yard, and under contract #6517, October 8, 1896, the price was $1.10 per square yard; yet the record shows, and the court found, that Carter asked to be relieved from duty at Savannah before he ever paid out a dollar on either of these contracts, and that neither he nor Westcott ever received a dollar of the profits from either of these two contracts. (Ref., 470; Rec., 379, 359.)

Moreover, the testimony shows that a Board of Six Engineers prepared the plans for the improvement covered by contract #6517, and estimated that the brush mattresses would cost $1.00 per square yard. (Rec., 13200.)

All this is true according to the testimony and the finding of the courts, notwithstanding the bill, with characteristic disregard of the truth, alleges that the entire sum, less certain deductions was divided equally between Greene, Gaynor and Carter.

It follows that the ground so assigned by the Circuit Court of Appeals as evidence of Carter's guilt becomes proof of his innocence when the facts are known; that is to say, the very transactions used by the court to establish collusion with the contractors are proofs upon the court's own reasoning and finding which show there was no such collusion!

The Circuit Court of Appeals was clearly under

a mistaken impression as to these subsequent contracts, and it is equally clear that there was nothing in the facts that Captain Carter used the same specifications and resorted to the same kind of proceedings generally as to these subsequent contracts that he used with respect to the earlier contracts, that should raise a suspicion of guilt, in the face of the facts established by the findings of both courts that all the contracts let prior to the date, viz.: October, 1893, when Carter should have had knowledge and should have compelled a modification of the price, were "fairly obtained," and that there is no proof to show when the "connivance" commenced, but only "circumstances" from which it is *deduced,* or *inferred,* or *assumed,* that it began about said date of October, 1893; in other words, after ten of the fourteen contracts had been "fairly obtained," and obtained with the belief on the part of Carter that the terms and conditions of the same were "reasonable" and fair—that is, honest transactions throughout, according to the finding of both courts.

It may be safely asserted that except only for the assumption (for the amount of profits is not proven) that the contractors realized large profits, and the charge that these profits were shared by them with Westcott, the father-in-law of Carter, either for himself or for the benefit of Carter, there would not have been any *inference* against Carter to even apparently warrant the adverse decrees of the lower courts.

Effect of Proof on Bill.

Before taking up the subject of alleged profits and alleged divisions of the same with Carter, or for the benefit of Carter, attention is called to the fact that, with the findings of fact standing as made by both courts, it would be necessary, in order to make the bill conform to such findings, to eliminate 35 of its 61 allegations—practically all its harmful allegations, except only those with respect to profits and a division of the same. That is to say, with the concurring findings of the two courts standing as established facts in the case, there must be eliminated all the allegations of the bill about a conspiracy, or prearranged plan, or scheme to defraud the Government, entered into by Carter and the contractors, or any of them, or anybody else; and there must be eliminated all the allegations of the bill about misleading specifications, insufficient advertisements, discrimination in giving out information or withholding it, irregularity or favoritism in the letting or in the enforcement of the several contracts, the fraudulent allowance of the use of unfit materials to be paid for at high and exorbitant prices, and about the substitution of large quantities of brush mattresses, with the result of inferior work at extravagant cost to the Government, and so forth and so on all the way through that part of the bill. There must also be eliminated all the allegations of the bill in regard to the approval of fraudulent vouchers and the payment of the same.

NEW BILL.

If we were now to substitute for the bill that was filed by the complainant a new bill, drafted in accordance with these material and controlling facts which have been established by the concurring opinions of the two lower courts, it would have to commence with an allegation that in the years 1891 and 1892 and 1893, prior to October, 1893, the premises being as laid in the present bill, the Government *duly* entered into certain contracts for river and harbor improvements; that the specifications, advertisements for bids, awards and contracts were all in due and regular form; that the contracts were let to the lowest bidders, and were "fairly obtained" by the successful bidders; and that the work done under such contracts was done in compliance with the requirements of such contracts respectively; and that all such work so done was efficient, successful, satisfactory beyond expectation, and also beyond precedent; that it amounted, measured by its success and satisfactory and efficient character, to an "engineering triumph"; that Captain Carter made a number of changes during the progress of the work in the relative quantity of materials of different kinds; that he used larger amounts of certain kinds of materials and smaller amounts of other materials than he originally estimated would be used; or that he substituted in some cases one kind of material for another, both being contracted for in the contracts; but that all the changes were within the discretion and rights reserved to Captain Carter under the contracts, and that all of them were,

under the circumstances, wise and justifiable; and that the work thus done for the Government was improved and made more satisfactory and more efficient on that account; that the work was not only thus successful, but that its cost did not exceed the appropriation or the estimates, but on the contrary fell below the same; and that all money paid out by the Government through Captain Carter or entrusted to him for disbursement was faithfully accounted for by him; BUT THAT NEVERTHELESS, it has transpired that, notwithstanding all these facts, the work cost the contractors much less than their contract price, and that they, in consequence, derived great and unusual profits and gains therefrom, and that it now appears these profits were divided into three equal parts, and that one of these parts was paid to Robert F. Westcott, the father-in-law of Captain Carter, who subsequently turned it, or property or securities into which it had been converted, over to Captain Carter, WHEREFORE recovery is asked, etc.

If such were the bill before this court,—and going no further than the effect of the concurring opinions of the two courts, that is all that is left of the bill that is before the court,—how would the case stand, or rather how does it stand? for that is the bill as it stands at this stage of the examination of the evidence and the record.

Would an action lie to recover such one-third part so paid to Westcott and finally received by Captain Carter, without some allegation to show some kind of fraud or wrongdoing on the part of Carter that

had worked a corresponding damage to the Government?

And in the absence of such an allegation would not the court assume that the transaction as between Westcott and Carter was innocent? that it was of some proper character, such as Carter claimed it was, when he testified and proved, as it will be shown, that all the money he received from Westcott was paid to him as gifts or as an advancement of his deceased wife's share of her father's estate, and without any knowledge on the part of Carter of the source from which the money had come to Westcott, and without even a suspicion that it, or any part of it, had come to Westcott from Greene and Gaynor, and without any knowledge that Westcott was a secret partner of Greene and Gaynor, or interested in any manner in their contracts, or the profits arising therefrom?

It would, of course, be a grossly improper thing for Carter to receive such money, *if he knew the source whence it came.* But on what ground would the Government claim it, assuming always that these findings show, as they do, that the contracts were "fairly obtained"—honestly entered into and performed—as has now by the testimony and these concurring opinions been established? Would not any court sustain a demurrer to the bill on the ground that no matter how suspicious the transaction might appear, yet upon the facts stated, the Government had suffered no damage and had parted with all of its right to the money when it paid it out in the dis-

charge of its obligations? Would it not be assumed in the absence of proof to the contrary that there must be some explanation for the receipt of the money consistent with Carter's right to receive it? If so, then clearly something more would have to be alleged in the suggested substitute bill; and not only alleged, but, in order to entitle the Government to recover, it would have to be proved.

It is claimed that something more is alleged, and that is true; but is it sufficient? and if sufficient, is it true?

Prices and Profits.

First it is alleged that the prices paid for materials were excessive, and that in consequence excessive profits were realized.

Neither excessive prices nor excessive profits would be sufficient, standing alone, for both are consistent with common experience and the strictest integrity.

With that single remark both suggestions might be dropped, but it is due Captain Carter to point out, so that these allegations may not have a prejudicial effect on other features of the case, that as a matter of fact there were neither excessive prices, nor, so far as he was responsible, excessive profits.

The allegations of the bill on these points are shown by the testimony to be gross exaggerations and utterly reckless and unreliable.

BRUSH MATTRESSES.

In the first place, although the statements of the bill are broad enough to cover and embrace all the materials named in the several contracts, and all the respective prices therefor, yet there is not a word of testimony to show that the price for any material was even questioned except only the price for brush mattresses, and both courts below so found.

At once, therefore, the whole case as to prices and profits narrows itself down to the prices named for this one material and the profits arising therefrom.

The bill alleges that fraud was intended and perpetrated by calling for bids for brush mattresses by the square yard instead of the cubic yard; that bids had never before been called for by the square yard, but always by the cubic yard, and that this alone made a difference of more than 300 per cent. against the Government.

But what is the proof?

As shown under sub-head No. 8 of this brief, p. 43, the testimony is that while loose brush fascines had theretofore been bought by the cubic yard, yet brush mattresses had been repeatedly, if not always, bought by the square yard, and that Captain Carter in calling for bids on brush mattresses by the square yard, was not only following precedent, but was securing his mattresses at a cheaper price than if he had bought them by the cubic yard.

On this point the trial judge said:

"The contract of 1892 for the improvement

of the Savannah River as well as the other contracts complained of, called for bids for mats, by the square yard. These contracts were all submitted to and approved by the Chief of Engineers' office, and the Department, upon suggestion of the engineer in charge, whose recommendations in such matters, the Government claims, are generally followed. Until Carter pursued this method, it is asserted, mats had always been purchased by the cubic yard. This does not seem to be justified by the evidence. Mats had been paid for by the square yard by Col. Black in 1890, Col. Bixby, 1889 and 1890, Captain Carter, 1891, and Col. Stanton, 1892. Whenever mats to any considerable amount were required, they were purchased by the square yard." (Rec., 368.) * * *

"Col. Bixby, of the Corps of Engineers, claims for himself and Major Black the credit of first using mats by the square yard, back in 1889 and 1890. The same method of measurement was employed by Major Stanton in about 1892. Carter had previously, in one or two instances, paid for these brush mats by the square yard. There seems to be no reason why this class of work should not have been dealt with by the square yard. The only manner in which fraud would in such case be accomplished must be in the price paid, or in the character of work accepted, or both." (Rec., 369.)

The Circuit Court of Appeals did not disturb this finding, and could not, for there was no testimony to refute or contradict the testimony as to the prior purchase of mattresses by the square yard.

The question is then as suggested by the trial court in the last sentence of the above quotation whether there was any fraud (a) in the price paid, or (b) in the character of the work done, and it

has already been shown that the character of the work was excellent.

TESTIMONY AS TO PRICES PAID BY CARTER FOR BRUSH MATTRESSES.

Complainant's Witnesses.

The only witnesses who testified that the prices paid were excessive are Captain Gillette and five of his employes who are discredited by the trial court in the following words:

> "There is discernible some more zeal on Gillette's part than comports with an impartial investigation of his predecessor's transactions *which seems also to have had its effect upon those who were his subordinates at the time of taking their evidence.*" (Rec., 378.)

The evidence of Captain Gillette and his five employes is as follows:

Gillette. He gives no details but says he thinks the cost of the mattresses was "between 10 and 15 cents per square yard." (Rec., 1103.) He admitted that he never saw any of these mattresses and knew nothing whatever about them (Wit. 15-16) and admitted on the witness stand that he considered this a personal fight between him and Carter and that he would hurt any one who stood in his way (Rec., 2914), and the trial court found that he threatened to injure the character of Ely, a contractor, if he would not testify against Carter (Rec., 379) and that he discharged an employe named Gieseler for testifying in Carter's favor. (Rec., 379.)

During the court martial trial Gillette tried to induce Major Rees of the Engineers to testify falsely

against Carter, threatening to ruin him if he would not do so. Concerning this action of Gillette, Gillette himself testifies that he said to Rees:

> "I says, 'Well, you are down here as a witness?' He says, 'Yes, I am still a believer in Carter.' I says, 'That is all right, but * * * *there are two ways of stating the truth.* * * * You had better come up to the office and look things over.'" (Rec., 4173.)

Concerning this same matter Major Rees testifies of Gillette:

> "He went on to show me what he could produce against Captain Carter, particularly with reference to the quarantine matter,—which I knew all about and knew there was not anything to it,—tried to make that as black as possible, * * * and told me to come up and he would show me lots of things." (Rec., 2915.)

Gillette then urged Rees to testify against Carter on the ground that it would be to his interest to do so, saying, as Rees testifies:

> "Now, you and I will be in the Corps of Engineers longer than Captain Carter; I know that. Now, we will have to be careful how we stand in this business." (Rec., 2914, 4173.)

When Gillette found he could not persuade Rees to testify falsely against Carter, Gillette then threatened to hurt Rees, saying to him, as Rees testifies:

> "I realize that I am held socially, professionally and officially responsible for the charges against Captain Carter. *I realize that it has come to be a fight between him and me; and when I am fighting, I fight hard, and anybody who stands in my way is liable to get hit. It would make no difference if it was my best friend, I would hit him and hurt him if I could.*" (Rec., 2914, 4173.)

On the witness stand Gillette admitted he used that language to Rees, saying: *"I may have said what he said I did"* (Rec., 4173); and Gillette further admitted on the witness stand that when he made that threat to hit and hurt Rees if he could, if Rees would not testify against Carter, he made it for the following reasons:

> *"The whole point of the conversation, when I said I would not spare my best friend, was to give him, as delicately and as decently as I could, a hint of what would happen to him, if he [Rees] testified before this court in a biased manner which would give the court wrong impressions."* (Rec., 4173.)

Among the many false sworn statements of Gillette in this case are the following:

(a) On the witness stand Gillette testified that the tensile strength of the rope used by Carter to bind fascines was less than 29 pounds. (Rec., 1100, 2991.) The rope was then tested and its tensile strength was found to be 198½ pounds. (Rec., 2996.)

(b) Gillette swears that under a contract at Darien in 1892, Carter paid 89 cents a cubic yard for fascine mattresses (Ex. 193); the truth being that no mattresses of any kind were purchased under that contract. Gillette's sworn statement was pure fiction. (Rec., 10193, *et seq.*)

(c) Gillette swears that under a contract at Savannah in 1889, Carter paid $1.42 a cubic yard for "fascine and pole mattresses" (Ex., 193); the truth being that no fascine and pole mattresses were purchased at all under that contract. Gillette's sworn statement was pure fiction. (Rec., 9961 *et seq.*)

(d) On Gillette's charges, Carter was tried by court-martial for having falsely stated to the Chief of Engineers that one Willink and others had demanded as much as $50,000 excessive damages for work Carter had proposed at Hutchinson Island at Savannah.

As matter of fact, Willink had demanded $198,259.92, and his written demand had been referred to Gillette, and Gillette had made a written report thereon, and the papers were in Gillette's possession when he made the false charge against Carter: but Gillette suppressed the papers, and some one caused Willink to testify he had made no such demand, and Carter was convicted of the charge, and was severely criticized for it by Senator Edmunds, but was exonerated by Attorney-General Griggs and President McKinley.

The official papers fully confirming Carter, and Willink's demand and the endorsement of Gillette have now been discovered and are in evidence. (Ref., 43. See, also, Rec., 8233-38.)

Marion Twiggs. This witness was an employe of Gillette. He gave no detailed cost of mattresses but said "my estimate is about 10 cents." (Rec., 1159.)

Hale. This witness was also an employe of Gillette. He gave no details of mattress cost but said, "I think about 13 cents per square yard." (Rec., 1305.)

Cooper. This witness was another employe of Gillette. He said of the mattress cost "I have computed it to be 9 cents" (Rec., 1177), but Cooper at first estimated the cost of the identical mattresses

at 70 cents a square yard (Wit. 21); and Cooper who was under Gillette's orders admitted on the witness stand that he would obey orders he "knew were wrong" rather than lose his place. (Rec., 1225.)

Keating. This witness was also an employe of Gillette. He was a boatman without experience in mattress construction and said he thought the mattress cost was "about 10.1 cents" a square yard (Rec., 1360); but he admitted he knew nothing whatever of mattress cost and that he got his "estimate" from others. (Rec., 1365-1367.)

Giesceler. This witness was also an employe of Gillette. He admitted that his "estimate" of cost was simply a compilation from data furnished by others, that mattress work had "never come under his observation" (Rec., 1326); that his duties were simply "investigations of a theoretical character" (Rec., 1326) and when asked if he had ever had any practical knowledge of mattress construction and cost replied "None whatever." (Rec., 1326.) This witness *estimated* the cost at 11.4 cents per square yard (Rec., 1326), but he admittedly based his estimate on an *assumption* that the fascines in the mattresses (the main item of expense) cost only 5 cents for a fifteen-foot fascine, or 1/3 cent per linear foot of fascine. (Rec., 1326.)

Colonel W. M. Black, corps of engineers, a witness for the complainant, found by actual experience that at the usual price of labor of $1.50 a day (Rec., 806, 2561) such fascines really cost "$3.16 per 100 linear feet" (Rec., 13334), *i. e.*, 3-1/6 cents

per linear foot, or *9 times what Gieseler assumed!* As the main cost of the fascines is the cost of labor, hence Gieseler's estimate was based on labor at 1/9 of $1.50 a day, or 17 cents a day, which according to complainant's witnesses is the actual price paid by Greene and Gaynor through peonage for their labor. (Ref., 59-62.) So that Gieseler's estimate of the cost of brush mattresses was based on peonage labor at 17 cents a day and *not* on the fair market price of labor at $1.50 a day!

The foregoing are the only witnesses—*six in all*—who testify the prices paid were excessive.

Evidently they accepted their figures from Gillette, as the trial court intimated (Rec., 378), or they either were otherwise misinformed, or based their estimates on the cost of peonage labor.

Defendant's Witnesses.

On the other hand Colonel W. M. Black, corps of engineers, although called as a witness for the complainant, testifies that even had the mattresses been constructed exactly as the complainant says they were the cost could not have been less than 47 cents a square yard. (Rec., 749.) Colonel Black expressly says he made no "estimate of the cost of the mattresses actually used by Captain Carter" saying "I could not get sufficient data to do it" (Rec., 750); and Colonel Black in 1895 stated in writing in an Official Report to the Chief of Engineers that the fair cost of such mattresses at Cumerland Sound in Carter's district was $1 a square yard (Rec., 13200) and he testifies that in the district adjoining

Carter's a contractor under him failed in 1891 at a price of 70 cents a square yard. (Rec., 698.) Moreover, Col. Black built such mattresses for the Government in the district adjoining Carter's in 1888, and he testifies that their actual cost, exclusive of interest on plant, profit, etc., was from "60 to 65 cents" per square yard. (Rec., 698.)

Colonels Black and Gaillard estimated from memoranda given them by Gillette that a "sample mattress," never seen by them, and made and sunk after Carter had left Savannah, and admittedly containing only 4/9 of the material called for by the contract, would cost about 34 cents per square yard. (Ref., 200-09.)

That the price paid was the fair and usual price for such work is shown by the statements and testimony of 12 *distinguished officers of the corps of engineers,* 5 *able civil engineers and inspectors and* 12 *disinterested contractors, competitors of Greene and Gaynor.*

The trial court said of defendant's witnesses that they

> "were either Government engineers or prominent civil engineers or contractors in competition with Greene and Gaynor, all of them men of standing and eminent in their line. As might be expected they are not all advised in detail as to the work in question. They were however posted generally in regard to the construction and methods complained of and are entitled to great consideration. *It is an impressive fact in this case that the defendant is so emphatically endorsed by these men who are above suspicion.*" (Rec., 379.)

The 29 witnesses who report or testify that the

prices paid for brush mattresses were the fair and usual prices for such work are as follows:

Engineer Officers:

Gen. T. L. Casey, Chief of Engineers, made written contracts for brush mattresses at Mayport, Florida, adjoining Carter's district, in 1888, at 74 cents per square yard (Rec., 13251); at Cumberland Sound, Florida, in Carter's district, in 1891, at 97 cents per square yard (Rec., 10091); at Cumberland Sound, Florida, in 1892, at $1.05 per square yard (Rec., 10145); at Winyaw Bay, S. C., adjoining Carter's district, in 1892, at $1.05 per square yard (Rec., 9262, 9265).

General Alexander Mackenzie, Acting Chief of Engineers, made a written contract for brush mattresses at Savannah, Georgia, in 1896, at 95 cents per square yard (Rec., 10371), and at Cumberland Sound, Florida, in Carter's district, in 1896, at $1.10 per square yard (Rec., 10393).

Gen. W. P. Craighill, Chief of Engineers, testifies specifically in this case that he recommended the award of the Cumberland Sound contract of October 8, 1896, in Carter's district, at $1.10 per square yard. (Rec., 903, 12220.)

Gen. P. C. Hains, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound, in Carter's district. (Rec., 3200.)

Col. H. M. Adams, Acting Chief of Engineers, approved in writing the contract of July 20, 1891, at

Fort Clinch, Florida, in Carter's district, for brush mattresses at 99 cents a square yard. (Rec., 10107.)

Col. W. S. Stanton, Corps of Engineers, made a written contract at Winyaw Bay, S. C., adjoining Carter's district, on November 8, 1892, for brush mattresses at $1.05 per square yard (Rec., 9265).

Col. W. H. Bixby, Corps of Engineers, made a contract at Winyaw Bay, S. C., adjoining Carter's district, in 1891 for brush mattresses at 70 cents per square yard (Rec., 9242; 9245), the contractor at the same place having failed at 57 cents per square yard in 1890. (Rec., 8492.)

Col. W. M. Black, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district (Rec., 13200), and Col. Black testified that a contractor under him in the adjoining district failed in 1891 at 70 cents per square yard (Rec., 698). Col. Black actually constructed such brush mattresses in 1888, in the district adjoining Carter's, and Black testified in this case that the actual cost of those mattresses to the Government without any profit, interest on investment, risk, etc., was from 60 to 65 cents'' per square yard (Rec., 698).

Col. T. H. Handbury, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 a square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Col. F. V. Abbot, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1

per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Maj. T. H. Rees, Corps of Engineers, now Division Engineer at Chicago, who was Carter's assistant on the Savannah work, testified that the fair cost, without any profit, of the brush mattresses used in the Savannah district in 1893 was from 60 to 80 cents per square yard (Rec., 2849).

Maj. Harry Burgess, Corps of Engineers, made a written report to the Chief of Engineers in 1895 that $1 per square yard was a fair price for brush mattresses at Cumberland Sound in Carter's district. (Rec., 13200.)

Civil Engineers and Inspectors:

G. Y. Wisner, director Am. Soc. of Civil Engineers, testifies that the brush mattresses used at Savannah from 1891 to 1896 would cost at least 95 cents a square yard (Rec., 2624).

G. W. Brown, civil engineer, who was employed by Captain Carter on the work, testifies from his own knowledge that the fair cost of the brush mattresses used in the Savannah district from 1891 to 1896 was from 80 to 85 cents a square yard (Rec., 852, 985).

R. S. Burnett, civil engineer, who was employed by Captain Carter on the work, testifies from his own knowledge that the fair cost of the mattresses used in the Savannah district from 1891 to 1896 was about 81 cents a square yard. (Rec., 986.)

J. W. Rutherford, a civil engineer of 28 years' experience, testifies that $1.05 a square yard was a

fair price for brush mattresses at Cumberland Sound in Carter's district in 1896. (Rec., 3160.)

J. W. Daniels, inspector, who was employed by Captain Carter and who inspected and measured a large part of the mattress work in the Savannah District, testifies that the mattresses used from 1891 to 1896 cost from 75 to 85 cents per square yard (Rec., 995).

Competitive Contractors:

W. F. McCauley, a competitive contractor and a witness for the complainant, testifies that $1.13, the price he bid per square yard (Rec., 13239), was "very reasonable" for the brush mattresses used at Savannah under the 1892 contract (Rec., 1014).

Jacob Friday, a competitive contractor and the man who built the Charleston, S. C., jetties, testifies that the actual cost of the brush mattresses used in the Savannah district was from 80 to 90 cents a square yard. (Rec., 995.)

R. Moore, a competitive contractor, testifies that the lowest possible cost of the brush mattresses used in the Savannah district would be 60 cents a square yard, and that such cost would be increased 25 to 30 per cent. according to circumstances (Rec., 1015.)

E. L. Friday, a competitive contractor, testifies that $1.12 a square yard was a "very reasonable" price for the mattresses used under the 1896 contract in Carter's district. (Rec., 996.)

S. W. Skinner, a competitive contractor, testifies that 95 cents to $1.10 a square yard was a reasonable price for the brush mattresses used in the Savannah district (Rec., 1021).

A. R. Stewart, a competitive contractor, testifies that $1 a square yard is a fair price for the brush mattresses used in the Savannah district in 1896 (Rec., 651).

R. G. Ross, a competitive contractor, who built the first brush mattresses ever used on the South Atlantic coast, testifies that the actual cost of such mattresses as were used in the Savannah district is about 90 cents a square yard (Rec., 8794).

Thomas E. Wallace, a competitive contractor, testifies that 95 cents to $1.10 a square yard is a reasonable price for the mattresses used in the Savannah district (Rec., 1022).

J. L. Grim, a competitive contractor, testifies that it costs from 80 cents to 95 cents a square yard to build the brush mattresses used in the Savannah district (Rec., 1008).

J. B. Sanford, a competitive contractor, testifies that the brush mattresses used in the Savannah district could not be built for less than from 95 cents to $1.10 a square yard (Rec., 1020).

I. H. Hathaway, a competitive contractor, who executed similar work on the St. Johns River, which is adjoining Carter's district, in 1892, testified that $1.10 per square yard for brush mattresses in the Savannah district is reasonable. (Rec., 1009.)

J. A. Bryan, a competitive contractor, who bid on similar work at Jacksonville, which is adjoining Carter's district, in 1889 and 1891, testifies that $1.10 per square yard is a reasonable price for the brush mattresses used in the Savannnah district. (Rec., 1034.)

It is thus seen that the overwhelming weight of the evidence—substantially uncontradicted—is that the prices paid by Carter for brush mattresses were the fair and usual prices for such work at that time. If so, there could not have been any excessive profits in fraud of the Government, and the Circuit Court of Appeals was, therefore, under a false impression as to the evidence or accepted the allegations of the bill as though proof when it said that in "brush mattresses" "the United States was plainly defrauded in overpayments approximating $2,000,000." (Rec., 13427.)

On the contrary the testimony shows clearly that there were no excessive profits whatever unless as the result of peonage, which will be dealt with presently, but of which it may be here remarked that Carter had no knowledge at the time, and over which he could not have exercised any control if he had known about it, and of which the Government could not claim the fruits in any event.

Another View of Profits.

All this is confirmed by another view afforded by the testimony as to the question of profits.

The testimony shows that only nine contracts calling for brush mattresses were ever let by Captain Carter, and they were as follows:

No. 4572, May 4, 1891, Cumberland Sound (completed 1891), square yards estimated 50,000, square yards used 61,529, price per square yard 97 cents, sum paid $59,683.13.

No. 4637, July 20, 1891, Fort Clinch (completed

1891), square yards estimated 6,000 square yards used 7,744, price per square yard 99 cents, sum paid $7,666.56.

No. 4820, September 16, 1892, Cumberland Sound (completed May, 1893), square yards estimated 80,000, square yards used 107,735, price per square yard $1.05, sum paid $113,121.75.

No. 4960, October 22, 1892, Savannah Harbor (completed August, 1895, save small payment of about $400 in September, 1895, and a payment for stone and retained percentage in May, 1896), square yards estimated 350,000 square yards used 1,363,572, price per square yard 95 cents, sum paid $1,285,393.40.

No. 5253, March 1, 1893, Jekyl Creek, etc. (completed July, 1893), square yards estimated 9,000, square yards used 17,171, price per square yard 99 cents, sum paid $16,999.29.

No. 5811, November 15, 1894, Cumberland Sound (completed June, 1895), square yards estimated 50,000, square yards used 213,334, price per square yard (due to exceptional conditions; Rec., 3743) 57 cents, sum paid $121,600.38.

No. 6049, April 20, 1895, Darien Harbor, etc. (completed June, 1895), square yards estimated 7,000, square yards used 13,898, price per square yard $1, sum paid $13,898.

No. 6515, October 8, 1896, Savannah Harbor, square yards estimated 200,000, square yards used 218,320, price per square yard 95 cents, sum paid for mattresses (less retained percentage $177,663.60. Total payment $230,749.90.

No. 6517, October 8, 1896, Cumberland Sound, square yards estimated 200,000, square yards used 346,288, price per square yard $1.10, sum paid for mattresses (less retained percentage) $342,825.12. Total payment $345,000.

It is thus seen that the total square yards of mattresses used under all the contracts was 2,349,591 and that they cost $2,138,851.23.

The Circuit Court held that neither Westcott nor Carter ever received anything from the 1891 contracts (Rec., 385), the evidence showing that the profits on these contracts were divided in equal thirds, between B. D. Greene, J. F. Gaynor and A. M. Bangs; (Rec., Vol. 28, Ex. 434) and the Circuit Court also holds that neither Westcott nor Carter received anything from the 1896 contracts (Rec., 359, 391). The Circuit Court of Appeals by its decree affirmed these findings. Hence the mattresses used under the 1891 contracts and the 1896 contracts, together with the sums paid therefor, must be deducted in order to determine the probable amount of so-called "fraudulent" profits as must also the 350,000 square yards of mattresses used under the contract of October 22, 1892, together with the price paid therefor, because the Circuit Court of Appeals upon certain assumptions it names holds that up to that time there was nothing for which Carter was responsible unreasonable in the price paid. (Rec., 13426.)

The total mattresses used and the prices paid therefor must be, therefore, subject to the following deductions:

#4572, May 4, 1891,	61,529 sq. yds. at 97 cts.	$59,683.13
#4627, July 20, 1891,	7,744 sq. yds. at 99 cts.	7,666.56
#4960, Oct. 22, 1892,	350,000 sq. yds. at 95 cts.	332,500.00
#6575. Oct. 8, 1896,	218,320 sq. yds. at 95 cts, less retained percentage	177,663.60
#6517, Oct. 8, 1896,	346,288 sq. yds. at. $1.10, less retained percentage	342,825.12
	983,881	$920,338.41

Making the deductions just ascertained, namely, 983,881 square yards of mattresses, costing $920,338.41, we have left 1,365,710 square yards of mattresses costing $1,218,512.82 as the maximum amount paid out for brush matresses from which there could by any possibility have been made the "fraudulent" "overpayments approximating $2,000,000" according to the specific basis of computation as fixed by the findings of the Circuit Court of Appeals; so that the statement that "the United States was plainly defrauded" (in brush mattress work) "in overpayments approximating $2,000,000" out of a total payment of $1,218,513, *even if the whole sum were excessive profits,* is manifestly impossible and erroneous, but it has been already shown that there were no excessive profits whatever, unless as the result of peonage!

But even if the court had not held that there was nothing wrong prior to October, 1893, it would be impossible for the United States to be defrauded in overpayments amounting to two millions of dollars.

On hazardous work of that character no engineer or contractor would consider a profit of twenty-five per cent. excessive, so that on the sum of $2,138,851.23 paid out for brush mattresses a legitimate profit might amount to at least $535,000, in round figures.

Every competitive contractor familiar with such

work who testified in this case, as well as every officer of the corps of engineers, civil engineer or inspector familiar with the work who testified in this case, estimated that the actual cost to the contractor of work of this character, without any profit, was from about 60 cents to 90 cents a square yard, say an average of 75 cents a square yard.

Inasmuch as 2,350,000 square yards in round numbers were put into the work, the cost thereof in round numbers, would be, according to these estimates about $1,760,000. The legitimate profit of $535,000 added to that sum makes a total of $2,295,000, or a sum greater than all the payments ($2,138,851.23) for brush mattresses on all the contracts let by Carter during the whole period that he was in charge of the district, thus showing that not as much as 25 per cent. profit was made, or could have been made by the contractors, unless by the oppression of their labor; or in other words, that there were no excessive profits that Captain Carter could foresee, or was bound to acquire knowledge of, or which he could prevent or control if he did acquire knowledge of them.

PEONAGE LABOR.

The evidence shows that the market price of labor at that time and place was $1.50 a day (Rec., 806, 2561), but that the contractors "through a shameful course of treatment of the workmen" got their labor for brush mattresses at $1.00 a week and board which was "of the worst." (Rec., 381, 1993.)

For example, Hector Kinlaw, one of Greene & Gay-

nor's laborers, and a witness for complainant, testifies:

"Q. * * * How often were you paid?
A. Every two weeks." (Rec., 1993.)
"Q. How much did you get at that time? What sum of money was paid to you at the end of two weeks?
A. At the end of two weeks, we drawed two dollars apiece.
Q. Two dollars at the end of two weeks?
A. Yes, sir." (Rec., 1993.)
"Q. Was that the most you ever received?
A. Yes, sir; that was the best we got.
Q. One dollar a week?
A. Yes, sir." (Rec., 1993.)

Getting their labor at so little cost enabled the contractors to make much larger profits than they would otherwise have realized, and these profits, as to the amount of which there is no satisfactory proof, may have been (and probably were) on this account excessive, although they could not have amounted to anything like the sum of $2,000,000 mentioned in the bill and by the Circuit Court of Appeals, nor perhaps to one-half or even one-fourth of that sum. Fortunately the amount is immaterial, for, whether great or small, the United States can not claim the fruits of peonage on any theory or under any circumstances.

But even if the Government had a right to recover profits thus wrongfully made it could not make such a recovery without some intelligent proof showing at least approximately the amount of such profits. There is no pretense that there is any such proof in the case except only as it may be *inferred* and *deduced* and *implied* from circumstances confessedly

complicated, confusing and unreliable. This is indicated by what the Circuit Court said on the subject:

> "No doubt some shameful part of the profit reaped from these harbor constructions came in this way. How much can never be ascertained. Certainly not all of it, nor even relatively speaking, a considerable portion thereof." (Rec., 381-82.)

The Circuit Court of Appeals recited this finding without dissenting from it or modifying it in any way, thus indicating acquiescence if not concurrence. (Rec., 13417.)

In addition, the Circuit Court of Appeals in the quotation made on p. 52 hereof, as already noted, attributed the excessive profits of the contractors to purchase of brush mattresses by the square yard instead of by the cubic yard.

The amount of peonage profits may have been larger than the trial judge seemed to think it was, but any estimate must be, as his was, a mere guess, for there is no testimony that shows the facts with any certainty. No witness has even undertaken to make an estimate. There can be no recovery upon such insufficient testimony, especially not from Carter, without proof of knowledge and acquiescence or some other action on his part amounting to a participation that would impose upon him responsibility for the wrong, and there is no such proof.

Besides, the fact, that all materials were to be delivered, measured and accepted on the work (Rec., 10162-63) and that the brush mattresses were brought from long distances, many of them as far as

95 miles (Rec., 3464) would negative the assumption that he was negligent in not knowing about the practice of peonage upon their laborers by the contractors.

But if it were otherwise, and it were permissible to *speculate* and *conjecture* and *infer* and *deduce* and *guess,* and thus fix liability, there would certainly have to be eliminated from the gross amount of profits made under these contracts all the legitimate profits, and it is shown by the testimony that the amount of stone, piling, fascines and other materials used besides brush mattresses, and the work done in connection with them, *i. e.*, about $1,400,000, was sufficient to yield a legitimate profit of not less than $350,000, estimated at 25 per cent. of the amount paid out by the Government on that account.

No one pretends to question the amount or the legitimacy of this portion of the profits. This was especially risky and hazardous work, particularly the improvements of the Savannah Harbor and of Cumberland Sound. It is also established by the testimony and by the concurrent findings of the courts below that the work was successfully done to a degree that exceeded all expectation and was practically without any precedent. The results were of the greatest advantage to the commercial interests of Savannah and that vicinity. The precise objects sought to be accomplished by the Government were accomplished. Can the Government under such circumstances, having ascertained that the contractors oppressed their labor, and in consequence made unusual or excessive profits thereby on a part of the work, now pursue them and all others into

whose hands such profits, or any part of them, may have come and recover them,—those that were legitimately earned, as well as those that were illegitimately earned by oppression of their labor? If the Government could recover either class of profits, would it not be necessary by clear proof to first separate the classes and establish their respective amounts; and failing to do that could the Government recover anything whatever? The mere statement of the proposition is sufficient to refute it, and yet there is no other ground to be found in all this record on which to give the Government the relief prayed for in this suit.

THE CLAIMS OF THE GOVERNMENT ARE NOT SUSTAINED.

But assuming that the theory upon which complainant computes the profits which it alleges were made and divided, and a part of which it is now seeking to recover, is correct, the testimony shows that the complainant in making up the amount of so-called profits which it claims a right to recover, has made so many gross exaggerations, misstatements and mere guesses and inferences, that all it says in that behalf is utterly unreliable.

On the subject of profits, no books of account, checks or drafts were produced to show any details of disbursements on account of the work either for labor or materials, and no other written evidence of any kind was produced. The only pretense of any evidence as to the profits of Greene & Gaynor is the fact that their bank account at various times was charged with various sums, and that about the same

time Westcott's bank or broker's account was credited with amounts in some instances similar; and it was therefore *assumed* that the moneys deposited in the bank account of Greene & Gaynor, out of which payments appeared to have been made to Westcott, consisted entirely of profits.

In a great many cases there was no pretense even of any "coincidence" between the amounts charged against the bank account of Greene & Gaynor and the deposits of Westcott, but Westcott was then "assumed" to have received in some way one-third of the sums deposited by Greene & Gaynor. During the progress of the trial, although not in the printed record before this court, the official typewritten report by the official stenographer during the trial (p. 164) shows that the trial judge announced from the bench:

> "Where there was a fund to divide, the court will *presume* that it was divided."

But to be more specific and to illustrate; it has been pointed out by the 36th allegation of the bill, as given and numbered in this brief, that it is claimed "the aggregate sum of $16,000 has been 'traced' with reasonable certainty to Carter from fraudulent profits realized on the contracts of 1891;" and by the 44th allegation of the bill, it is charged "that out of this $16,000 he bought bonds to the amount of $13,438.75."

This is a specimen of practically all the allegations of the bill with respect to the so-called division of profits. These allegations were put into the bill after repeated investigations of all these trans-

actions, after the Board of Engineers had sat, after the Court Martial, and after Carter had been put in prison and when it might fairly be presumed he was so disgraced and broken in spirit that he would not have courage if he lived to come out of prison to appear in court and controvert and show the untruthfulness of such statements. In other words, when it was thought to be safe to charge anything, no matter how untruthful. It is difficult to account for such allegations, in a bill in equity under such circumstances, upon any other theory.

The testimony shows that at the date when this division and distribution of profits of $16,000 is alleged to have been made there were *no contracts in existence* let by Carter to Greene and Gaynor or any of their associates, but that on the contrary Greene and Gaynor at that time were partners with one Hegeman in executing certain railway contracts, and some of the payments made by Greene and Gaynor admittedly went to Hegeman, and the Circuit Court found specifically that neither Carter nor Westcott ever received anything from the proceeds of these contracts. (Rec., 385.) This was affirmed by the decree of the Circuit Court of Appeals. (Rec., 13432.)

The testimony as to the alleged division into thirds of the money paid out by Carter on the contracts of 1891, shows that one-third was paid to Benjamin D. Greene, one-third to J. F. Gaynor and the other third to Anson M. Bangs, the three equal partners to whom those contracts were let, and not a dollar of it is in any way traced to Carter or any-

body else other than these three partners. (See Exhibit 434, Volume 28 of the record.)

The Circuit Court after giving the details concerning the allegations of the bill with respect to this $16,000 and the investment of it in securities as alleged, says:

> "At these particular dates Greene and Gaynor had no Government contracts on hand and there is no reasonable theory upon which these payments can be held to have grown out of the contracts in question. They and one Hegeman were then partners in the construction of a railroad. Nothing appears in the record save the coincidences of the amounts and dates aforesaid upon which to make a finding against defendant as to these items. The coincidences are somewhat remarkable although not exact in but one instance. They are suspicious but neither in or of themselves nor in the light of subsequent transactions between the parties can it be said that they in any way affect the Government. Therefore complainant's prayer as to them is denied both in regard to the sources from which they were procured and as to the title to the securities in which they have been invested." (Rec., 385.)

The court will note the unreliability of deductions based on mere "coincidences" in bank accounts. It will be found as we proceed that there is no other kind of evidence of fraud in this case.

This finding by the trial judge was not disturbed by the Circuit Court of Appeals; on the contrary, by its decree affirming the decree of the Circuit Court, the Circuit Court of Appeals affirmed that finding.

Another specimen allegation of the bill relates to the contracts let October 8th, 1896, on account of

which no payment could be made until after July 1st, 1897, when the appropriations became available, on account of which Carter paid to Greene and Gaynor July 6th, 1897, the sum of $575,749.90.

The 40th allegation of the petition, as numbered in this brief, recites:

> "That having divided all their profits, as the work under prior contracts progressed, when the contracts of 1896 were entered into, Nos. 6516 for Savannah Harbor, and No. 6517 for Cumberland Sound, it was necessary to advance money to provide for their execution, and that Greene, Gaynor and Carter each advanced one-third of the amount necessary for that purpose and that from time to time they made similar advancements until July 1st, 1897, when the appropriation by Congress became available."

The 41st allegation of the bill, as numbered in this brief is as follows:

> "That Carter approved the accounts rendered by said conspirators in the name of the Atlantic Contracting Company, for large amounts charged for cheap and inferior work, not done in accordance with the contracts, and paid them at 'high, exorbitant and fraudulent prices' and 'did on or about July 6, 1897, pay upon said accounts so approved by him, the sum of $575,749.90' which amount, less deductions for moneys advanced for carrying on the work 'was divided in thirds between the said Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter."

It is unnecessary, in view of what has been already said, to refer again to the testimony to show that the allegations about "high, exorbitant and fraudulent prices," have been thoroughly disproved; but the utter recklessness of these allegations in their

disregard of the truth, is shown by the fact that there is not one word of testimony in the entire record to show that Carter, or anybody for Carter, ever advanced a dollar on account of these contracts (Rec., 7296; 7313).

There is evidence that Greene borrowed $49,000 from Robert F. Westcott, and paid back $21,000 of it, but the testimony of McPherson is uncontradicted that this was a personal loan by Westcott to Greene (Rec., 7296), and there is no evidence as to what Greene did with the $49,000 he borrowed (Rec., 7313).

There is no testimony whatever and never was even the appearance of any testimony whatever, to justify the claim that Carter or anybody for Carter ever received a dollar in any way, directly or indirectly, from the $575,749.90, which the bill alleges was, after "deducting advancements," "divided in thirds between the said Benjamin D. Greene, John F. Gaynor and Oberlin M. Carter."

The whole statement is not only untrue, but without any excuse or justification whatever. There is nothing but suspicion, imagination and malice to prompt any such allegations, except only the fact that Carter although not technically so charged had already been convicted by the Court Martial of having received some share of this money and had been sentenced to be dismissed from the Army, disgraced before his countrymen, fined in the sum of $5,000 and imprisoned in the penitentiary for five years on account thereof,—not because there was proof before the Court Martial that he had shared in this money, but because, as set out by com-

plainant in its bill in this case as shown by allegation No. 60 of this brief, that although the—

> "Government was unable at that time to trace or locate funds and show divisions of the same between the conspirators, as charged,
>
> Yet nevertheless the evidence of conspiracy to defraud the United States entered into between the said conspirators in the letting of the contracts and in the doing of the work under them and the possession by Carter of so large an amount of securities from which he was enjoying the income, without any satisfactory explanation, furnished proof so plain of the guilt of said Oberlin M. Carter that he was convicted by said Court Martial, and sentenced to dismissal from the Army, and to pay a fine of $5,000 and be imprisoned at hard labor for five years."

In other words, we do not need to go beyond the bill in this case to show that Carter was convicted, *not* upon proof of having shared in fraudulent profits, but on *suspicion,* by *inference,* by *deduction,* by *assumption,* by *presumption.*

Such conviction was in response to the appeal of the Judge Advocate, who in urging a conviction, said:

> "I don't know, may it please the court, that it is necessary to make further illustration of our impotency. There is here a court, appointed by the President of the United States under its Constitution and laws, a court having the power to adjudge the death penalty and to send this accused officer, should he be found guilty, to the penitentiary for a term of years, and yet, *when it seeks information to enable it to pass upon the conduct of their comrade, the doors are closed.* * * * Could we but have an inspection of the books and accounts in the trust companies and banks of New York in which the combination did business, we could have followed

> that money beyond the point where we have followed it, and learned just what became of it. That knowledge is denied us. * * * We shall know sometime: but *we do not know now we can only infer.* Who else was there but Greene and Gaynor and the accused to have an interest in the $575,000? What is a fair inference? What is a logical inference? Let the court determine."

The court did "infer," and "determine," and did a greater wrong than any Carter has ever been charged with.

But while it is not necessary to go beyond the bill to ascertain this fact, yet there is some satisfaction in the knowledge that the testimony in this case shows conclusively that Captain Carter never received, directly or indirectly, one dollar of the money for which he has suffered all the humiliation and disgrace to which he has been subjected. The testimony on this point is so clear that both courts below held that neither Carter nor Westcott received anything whatever under the 1896 contracts (Rec., 359, 379, 13432), the only contracts on which Carter was tried and convicted by the Court Martial.

This is a notable demonstration of the wisdom of the law in prohibiting convictions in civil courts on suspicion, and requiring clear proof.

In this case, the trial judge, who had before him the entire court-martial record, found, as did ex-Senator Edmunds, that Carter's conviction was not justified by the evidence. (Rec., 360; 380.)

But the purpose in referring to this payment by Carter of $575,749.90 on July 6th, 1897, is not to

show or comment on the great wrong done him by the Court Martial, but only to show that the allegation that Carter advanced money on account of these contracts, and that this large sum of $575,749.90 was equally divided between him and two contractors, is shown by the testimony to have no foundation whatever in truth. (Rec., 7296, *et seq.*)

The $16,000 item mentioned above is the first money Carter is charged with having corruptly received, and this item, just considered, is the last of its kind. The two matters are the beginning and the ending. They are so utterly unfounded as to shock the conscience and necessarily discredit the other charges. In view of all this, it should not be necessary to consider any of the other charges, except on clear and specific proof, especially in view of what has been shown as to the untruthfulness of still other allegations. Therefore more to show they have not been overlooked than to make answer to them, attention is called to the following allegations of the bill and their complete refutation by the testimony in the findings of the lower courts.

THE TWIGGS CONTRACT.

The 33rd allegation of the bill, as set forth in this brief, charges that—

> "Carter applied such stringent and unfair construction of the specifications"

in a contract let to one Albert J. Twiggs, as to ruin him and thus prevent his again competing with Greene and Gaynor.

To dispose of this matter it is sufficient to cite

the opinion of the Circuit Court which held that Twiggs was not discriminated against; that he was the taker of a bribe; that he "lacked both the capacity and financial ability" to handle his contract; that he "became embittered;" and that his claims of oppression were false. (Rec., 375-76.)

The Circuit Court of Appeals did not disturb these findings.

THE $75 ITEM.

The 38th allegation of the bill, as numbered in this brief, is that the contractors paid Carter's expenses of $75 a trip to go to New York each month to get his third of their profits.

Neither court sustained this charge; the Circuit Court of Appeals disposed of it in the following language:

> "it does not appear, however, that Carter took part in or was present at any of the divisions referred to between the contractors and Westcott, nor is there any direct evidence that he was informed thereof." (Rec., 13425.)

The evidence shows that Carter never received any sum of $75 at any time from anybody; that in seven instances when Carter was in New York there is no pretense that it was paid to anybody; and that in seven other instances the item was purely fictitious, having been simply *invented* by the Government's expert accountant, E. I. Johnson; and that when the item did exist, the only proof of payment was to Greene and to Gaynor. (Rec., 7005-06, 7029-30, 7114-15, 7769-70.) (See also Ref., 418-22.)

THE GORDON LOAN.

The 47th allegation of the bill, as numbered in this brief, relates to the so-called Bierne Gordon notes, the charge being that the money loaned to Bierne Gordon was Carter's money and not Westcott's, and that the transaction was put into Westcott's name simply to cover it up.

Neither court sustained this allegation, and there was no evidence on which it could be sustained by either, the testimony showing clearly that Westcott paid over to Gordon the money loaned to him by check drawn on his own bank account. (Rec., 5642, 7078, 7218, 7837.)

CARTER NEVER BORROWED MONEY FROM GREENE.

The 43rd allegation of the bill, as numbered in this brief, charges that Carter "frequently resorted to borrowing money from Benjamin D. Greene, one of the contractors."

The Circuit Court held against the complainant, the finding being that Carter never borrowed any money from Greene, the only transaction being a loan by Greene to Carter's brother in 1886 when no contracts were in existence, which loan was repaid with interest in 1888, before Carter ever had charge of any contract work (Rec., 362), and that court further held with regard to the relations of Carter with Greene and Gaynor, and which are complained of, that "there is nothing to show that at the time there was anything improper contemplated by either of them." (Rec., 363.)

The Circuit Court of Appeals did not disturb that finding.

CARTER NEVER MADE SECRET INVESTMENTS.

The 43rd allegation of the bill, as numbered in this brief, charges also that Carter's illegal and fraudulent profits, were invested by him secretly in stocks, bonds, loans and real estate, etc.

Both courts refused to so hold, the evidence showing that Carter made no secret investments whatever.

On the contrary, McPherson testifies that there is no "evidence whatever showing that Carter made any secret investments anywhere." (Rec., 7771.) There is no evidence to the contrary.

CARTER HAD NO ACCESS TO WESTCOTT'S SECURITIES.

The 54th allegation of the bill, as numbered in this brief, charges that Carter "hurried back from England, expecting to be arrested, and that he "took out of his safety deposit box securities of the cost value of $414,437.50 which he had there;" that he "turned them over to the said Benjamin D. Greene and John F. Gaynor at the Hoffman House;" that said Greene delivered them to the "said Robert F. Westcott" and shortly thereafter Westcott "delivered back to Carter all of the aforesaid securities."

These allegations are specific and made so evidently with the intention of impressing upon them the idea of truthfulness, but the whole story is nevertheless

perjury from beginning to end, for in September, 1897, the securities in question were in Westcott's safe deposit vault, to which Carter's access had been cancelled by Westcott on July 6th, 1897, for the testimony shows conclusively, there being no evidence whatever to the contrary, that at the time when Carter returned from Europe the securities referred to were in the safe deposit vault of Westcott, and that Carter had no access whatever to the same, his right of access as an attorney in fact for Westcott having been cancelled by Westcott. July 6, 1897 (Rec., 5810-14), and that he had nothing whatever to do with the same until *a part* of them (not "all," as alleged) were delivered to him in the way hereinafter shown in Mr. Root's office in October, 1897.

The testimony further shows that the bonds that were delivered to Carter had been in the possession of Westcott—some of them for a number of years, and that he had clipped coupons and passed them to his own credit and had never accounted to Carter for the same.

All this is supported by the testimony of McPherson and Nelson, the expert accountants (Rec., 7415; 6892; 6902; 6825).

RECKLESS ALLEGATIONS.

There are many other reckless and false allegations in the bill which the complainant did not even try to justify by proof. It is not deemed necessary to point out all these, but one more is referred to as a sample. It is alleged that both Carter and Greene testified falsely before the court-martial that West-

cott had no interest in the contracts. A reference to the court-martial record shows that neither Carter nor Greene testified on that subject at all.

EDWARD ISRAEL JOHNSON.

Who is responsible for such false accusation?

It is not incumbent on the defendant to locate responsibility for these gross misstatements, but Edward I. Johnson, who swore to the bill of complaint, is probably primarily responsible for them, and inasmuch as the entire statement made by the government as to alleged division and distribution to Carter or to Westcott, his father-in-law, for his benefit, are based on examinations and reports made by Johnson to the government's officials and representatives, it is in order as a preface to a further examination of his work, to call attention to the fact that the trial judge said of him and his work:

> * * * "The government's expert witness has in a number of instances forced balances and drawn strained conclusions, which might, in a less conclusive showing, throw suspicion upon all his evidence on the subject, but the coincidences tending to identify moneys paid to the contractors with those in Westcott's bank accounts are, in the mind of the court, so conclusive, that the fact of such payments are beyond doubt as to a large number of the items."

This remarkable witness was a bank examiner and came into the case in the following manner:

Senator Edmunds.

After Carter had been convicted by the court martial the testimony was referred by the Secretary of

War to ex-Senator George F. Edmunds for examination and report as to its sufficiency to sustain a conviction. (Rec., 8982.) He made a careful examination and reported that in his judgment the testimony was not sufficient to support the conviction. (Rec., 8989.) In the course of his report, although favorable to Carter, he severely criticised Carter for some minor matters upon which testimony was heard before the court martial, which in his opinion Carter had not satisfactorily answered. To avoid prejudice to Carter on that account, if the report of Senator Edmunds should be examined, without digressing to discuss those matters, it is sufficient to say, and should be said, that as to all the charges as to which Senator Edmunds thus criticised Carter, Carter was not only acquitted by the President upon the recommendation of Attorney General Griggs, but has been able to show in this case that he was wholly and absolutely innocent, and that he had been prejudiced to the extent of exciting the criticism of Judge Edmunds only because Captain Gillette on behalf of the government withheld from the court-martial evidence in his possession, which was subsequently in this case produced and put into the record (Ref., p. 463-64), and which is referred to on page 69 of this brief.

Attorney General Griggs.

After Senator Edmunds had made his report the Secretary of War presented the case to the President. He thereupon referred it to Attorney-General Griggs, who, in the absence of Captain Carter,

called upon Edward I. Johnson, a bank examiner, as above stated, already in the service of the Government, to make an examination of the bank accounts of the several contractors and Carter and Westcott, his father-in-law, with a view to ascertaining whether or not in that way any incriminatory evidence could be secured to reinforce the testimony taken by the court martial. Johnson made an examination and made a report upon which Attorney-General Griggs relied in recommending to the President that the conviction should stand and the sentence should be executed. Referring to Carter's testimony that he had received the moneys of which he was possessed from his father-in-law, Westcott, Attorney General Griggs said: "If this explanation given by Captain Carter is true, then it exonerates him." Both lower courts have now held that statement true. Sentence was executed and Carter had been in prison for months before he knew what in addition to the testimony produced before the court martial had been submitted to the Attorney-General.

THIS SUIT WAS BROUGHT AT REQUEST OF CARTER.

Thus it was that Carter, after being exonerated by the report of Senator Edmunds, was again convicted upon testimony of which he had no knowledge and to refute which he had no opportunity. It was after all this had happened, and while Carter was in prison, smarting not only under the disgrace and humiliation that had been visited upon him, but also under the injustice of his conviction,

first by the court-martial, on mere suspicion, and then in the second place, before the Attorney-General, upon statements of which he had no knowledge, and which he was not allowed to answer, that, conscious of his own innocence and confident that in any civil tribunal, where he could enforce the attendance of witnesses and compel the production of books and papers, he could vindicate his character and conduct, he, and not the Government, took the initiative that resulted in this litigation.

On the 17th day of June, 1901, Carter addressed to the President the following letter:

"Fort Leavenworth, Kansas,
June 17th, 1901.

"The President:

Since my appointment to the United States Military Academy in 1876, I have striven loyally to serve my country with all of the intelligence and energy of which I was possessed. Nearly four years ago, from motives not necessary to mention here, an assault was made upon my honor, resulting in my trial by court martial for an alleged civil offense, and my subsequent degradation and imprisonment. Conscious of my entire innocence and of the fact that hence I was not and could not have been proven guilty at my trial, I begged for an impartial review of the evidence taken before the court martial. That review was made by ex-Senator George F. Edmunds, who stated that even admitting the illegal evidence adduced there, I was not proven guilty of the only offense of which I now stand condemned. He, however, reported against me on some minor points which affected my honor. I therefore begged for a trial before any tribunal where I might have the legal power to compel the production of evidence, which power I did not

possess in the trial by court martial; that request was denied for reasons not made public, and the case was referred to a second judge, this time the Attorney General of the United States. Nearly a year elapsed before he acted upon the case, during which time my many requests for a decision were denied. At last, on September 29, 1899, he reported to your Excellency that the evidence taken before my court martial showed me innocent of the offenses of which Judge Edmunds recommended me to be declared guilty, but he recommended me to be considered guilty of the charges of which Judge Edmunds had declared me innocent, because as he stated, he considered the uncontradicted evidence of my innocence taken at my trial improbable. He then gave some reasons for his belief in my guilt, none of which was based upon any evidence taken at my trial or in my presence.

I have always felt that if it were shown to Your Excellency, as it can be if opportunity is given, that the reasons assigned for my condemnation are not based upon any proceedings wherein I had an opportunity to be heard, and are moreover as a matter of fact false, this judicial error would not be permitted to stand uncorrected. For nearly two years the prosecution has been asserting my guilt through the medium of the public press, but my efforts to test the truth of those unproven assertions in a court of justice have been strenuously resisted. I have sought by every legal means in my power to compel a trial where I might confront the witnesses on whose evidence, taken in secret and in my absence, I have been condemned; but every avenue leading to a determination of the truth has been closed to me. I therefore address Your Excellency, not to ask any favor, but to beg for simple justice; to beg for an opportunity which I have never had, and

which Your Excellency can grant,—that of determining in a court of justice where there is power to compel the testimony both of soldiers and of civilians and whose decisions none may question, whether the unproven assertions of my guilt upon which I have been condemned are true or false. If true, such truth ought to be determined as easily in my presence and in the light of day, as in my absence and in secret. If false, as it can be shown they are, I feel Your Excellency will not want this awful judicial error to rest uncorrected. I beg for this opportunity for justice, not to escape any punishment however unmerited, but because I am innocent and because it is my birthright to be accorded an open trial where I may confront the witnesses against me.

I am, Sir,

Your Obedient Servant,

O. M. CARTER."

This letter was supplemented by the following letter addressed to the Attorney General by the late Hon. Jere M. Wilson, at that time Carter's attorney:

"Washington, D. C., July 10th, 1901.

"To the Attorney General:

Captain Oberlin M. Carter was tried before a court martial for alleged offenses; was convicted, fined $5,000; sentenced to be imprisoned for 5 years at hard labor; to be dismissed from the service of the United States, &c. The details in regard to this matter are well known in your department, and it is not necessary to repeat them here.

A court martial, by reason of its inability to compel the attendance of civilian witnesses and the production of papers, is without the power in many cases to do complete justice; and especially was this so in this case, because there were involved in the trial matters which could

not be determined without the evidence of civilian witnesses whose presence and the use of papers under their control could not be procured. Captain Carter has always asserted and still asserts his entire innocence of the offenses which were charged against him, and that upon a fair trial of those charges before a tribunal, civil or criminal, with power to enforce the attendance of witnesses and the production of books and papers his innocence would be made manifest.

There are two ways open to the Government and not to him available, by which such a trial can be had: 1st. He has been indicted in the United States Court in Georgia, charged with the same alleged offenses for which he was tried by the court martial above alluded to. A trial on that indictment would enable him to procure his testimony, and would result in a thorough investigation before a tribunal having ample power to ascertain the truth, and thereby judicially determine whether or not he is guilty of those charges or any of them. 2nd. The Solicitor General in his brief in the Supreme Court of the United States took occasion to enter into some details in respect of what had transpired in a proceeding with which Captain Carter had nothing whatever to do, to which he was not a party, and in which he had not had an opportunity to make any statement in his own behalf or to confront anyone who was examined in connection with that proceeding; and it was in that brief stated in substance that Captain Carter had defrauded the Government of $722,522.02.

Three months have elapsed since that statement was made in the Supreme Court and no action has yet been taken. Now, if the Government has such knowledge as justified such an assertion, then I submit that it ought to bring a suit against Captain Carter for this amount of money and bring it promptly, to the end that

the case may be tried and the truth of this assertion ascertained while witnesses are living, and not defer it until the witnesses are dead.

If the Government was defrauded of more than $2,000,000 and Captain Carter got over $700,000 of it, he owes that money to the Government, and steps should be taken to recover it.

If he does not owe it, that fact in common justice under the circumstances above alluded to ought to be judicially declared.

So, these two modes of getting at the truth of this matter are open to the Government: (a) try him on the indictment, and (b) sue him for the money.

If it be said that attendance for trial of the parties who were joined with him in the indictment cannot be had, the answer is that Captain Carter had nothing whatever to do with that. He can be tried separately, and insists that he should be brought to trial whether the other defendants are tried or not; or, that civil proceedings shall be instituted against him, and that the matter shall be brought to as speedy a trial as the ends of justice will permit. I bring this matter thus to your attention for the purpose of asking that the Department of Justice will in one way or the other take such action as will enable Captain Carter to have a trial before a tribunal possessing full powers.

Respectfully,

JERE M. WILSON,
Atty. of O. M. Carter."

When subsequently the suit had been brought, Carter voluntarily entered into the agreement of November 6, 1901, under which he turned over every dollar of money then subject to his control, without regard to the sources from which it had come or might have come. The record shows that he has

in this case waived every technical right and has consented that every kind of testimony (save only the testimony of Westcott and Johnson taken in a proceeding to which he was not a party and where he was not permitted to be present) without regard to whether it was competent or relevant, favorable or injurious, might be presented to the court if the Government so desired. It should be further noted that throughout all these trying years, whenever and wherever called upon to testify, or to make a statement with respect to the issues here involved, he has unhesitatingly, fully and consistently made answer. These statements will be searched in vain to find any inconsistency or any material deviation with respect to any subject, no matter how important or how unimportant.

It is not necessary to say that guilty men, especially men guilty of such crimes as Captain Carter has been charged with, do not act in any such manner. Only innocent men and honest men can make such a record as he has made in this respect, especially so in view of the adverse rulings and judgments he has encountered.

JOHNSON'S ACCOUNTS UTTERLY UNRELIABLE.

Returning now to the witness, Edward Israel Johnson, speaking in a general way, all the calamitous experience Captain Carter has undergone is due to him and to Captain Gillette, of whom enough has been said.

Johnson merits more attention. Not only is he responsible in the first instance for the false accusa-

tions of the bill concerning the $16,000 alleged to have been traced from the profits arising from the contracts of 1891, and the charge that Carter was interested in the contracts of 1896, first, to advance one-third of the money needed to carry them on until the appropriation was available, and then to share in the division of the sum of $575,749.90, in the manner alleged, but Johnson is shown by the testimony to have been guilty of a great number of other equally false charges, referred to by the trial judge when he said in his opinion that he had "in a number of instances forced balances and drawn strained conclusions." The following are only a few of them, but they are sufficient to destroy confidence not only in all his pretended statements of account, but also in his testimony generally, for they show clearly that he deliberately manufactured false statements and misrepresented the truth for the purpose of misleading the court, and succeeded, with full knowledge of all the falsity and perjury involved.

His statements purport to be abstracts of the accounts, and other evidence relating to money matters, and are designated as Complainant's Exhibits 319, 589 and 590.

Johnson's Exhibit 319.

Exhibit 319 is an attempt to make the court believe that the bonds, etc., which Westcott gave to Carter in October, 1897, in Thacher's office and in Root's office, were purchased by Carter with money received from Greene and Gaynor.

Whether or not Johnson's testimony and exhibits

can be believed and relied upon by the court, can be readily determined by considering the following statements, which are a few of those Johnson makes to the court in writing in his Exhibit E to the bill of complaint or in said Exhibit 319, which is an elaboration of Exhibit E.

—a—

Johnson found that on May 8, 1893, Greene and Gaynor each paid out a check, and that the sum of those two checks was $15,000. (Ex. 319; Div. 6.) Johnson then wanted to make it appear that exactly $15,000 in currency was deposited to Westcott's credit, so that it might seem as if that currency came from Greene and Gaynor. Johnson found that Westcott actually did deposit $500 in currency on May 13, 1893, and that he deposited $3,000 more on May 15, 1893, making a total of $3,500; so Johnson then made a written statement in the bill of complaint (Rec., 59) to which he swore (Rec., 44), that there was deposited to Westcott's credit on May 23, 1893, exactly $11,500 more in currency, thus making Johnson's desired total deposit by Westcott of $15,000 in currency, which corresponded in amount with Greene and Gaynor's checks for $15,000.

The truth is there was no deposit of $11,500 at all, either on May 23rd or at any other time, and Johnson invented that purely fictitious deposit of $11,500, simply because he needed it for the purpose of making a showing which might deceive the court. (Rec., 6679-80; 6693; 7860.) The real deposit on May 23, was a lump sum of $26,600

(Vol. 31; Ex. 256); but that amount disproved Johnson's theory, hence he misstated the amount of the deposit, and said in his sworn statement to the court that it was $11,500. He thus showed a "coincidence" where there was none.

—b—

Johnson swore that $11,500 in currency was deposited to the credit of Robert F. Westcott on May 23, 1893, and that it was "invested" in ten Chicago, Milwaukee & St. Paul bonds. (Rec., 59.) These bonds Westcott gave to Carter in Elihu Root's law office. (Rec., 59.)

As a matter of fact, Johnson falsely swore, as has just been shown, that the deposit of currency on May 23, 1893, was $11,500 (Rec., 6679; 6693); whereas the deposit of currency on that day was not $11,500, as Johnson states it was, but was a lump sum of $26,600, as is shown by the deposit ticket, in Westcott's own handwriting (which is in evidence), which deposit ticket Johnson had in his possession. (Rec., 7860; Ex., 256.) On the same day that Westcott deposited said $26,600, he checked out $26,550 of it, with one check in his own handwriting, to buy some real estate in New York. (Rec., 6706; Ex., 441.) Later on, Westcott decided not to buy that real estate (Rec., 4682), and Westcott then invested $22,000 of that money in a stable in New York, which Johnson admits was Westcott's own stable, and not Carter's, and not one penny of that currency ever went into the said Chicago, Milwaukee & St. Paul bonds, as Johnson falsely swore that it did. (Rec., 6687-89; 6696-98; 6705-06; 7873.) In fact, as

Johnson well knew, these C., M. & St. P. bonds were bought and fully paid for by Westcott himself on May 18, 1893, which was five days before said $26,600 was deposited. Westcott purchased the bonds for $12,662.50; part of that purchase price was paid out of Westcott's balance at his broker's, and Westcott then paid the balance of $9,014.75 of the cost thereof with his own check, on his own bank account, and that check was paid before the $26,600 was deposited. (Rec., 7861-62.)

—c—

In trying to make the court believe that Carter received money from Greene and Gaynor, and that he bought bonds with it, and that those bonds belonged to Carter, Johnson swore that on March 5, 1894, Greene and Gaynor paid out $8,075, and that part of that money was "invested" on "May 4, 1894," in five Wabash bonds (giving their numbers), costing $5,125. (Rec., 67.)

That statement appears to be both deliberately and intentionally false.

Instead of those particular five Wabash bonds being bought in May, 1894, with part of said $8,075, as Johnson swears they were, they were in fact bought by Robert F. Westcott himself more than four years before Greene paid out that $8,075. In fact, those five Wabash bonds were bought and owned by Robert F. Westcott himself before Westcott ever knew Carter, *i. e.*, Westcott bought those bonds on January 20, 1890 (Rec., 6618-20; 7871-73; Ex., 445); and Westcott held and owned those

bonds ever since their purchase, until he finally sold those bonds, while Carter was in Georgia (Rec., 6934), on May 19, 1897 (Rec., 7873; Ex., 239); and Westcott personally deposited the proceeds of said bonds in his own bank account (Rec., 7873; Ex., 441), and checked the same out for his own private purposes. (Ex. 441.) Johnson's sworn statement that they were bought in "May, 1894," out of money coming from Greene and Gaynor, is, therefore, a deliberate falsehood, manufactured by Johnson to mislead and deceive the court, just as he presumably misled and deceived Attorney-General Griggs and President McKinley.

—d—

Johnson swore that on December 4, 1894, Carter bought forty-five United States bonds with money coming from Greene and Gaynor, and that Carter sold three of those same bonds on April 21, 1897, for $3,423.75 and invested the proceeds in the Orange, New Jersey, property involved in this case. (Rec., 71; 83.)

The truth is Carter did not buy those bonds at all, but Robert F. Westcott, in person, bought those bonds, through his brokers in New York, on December 4, 1894, when Carter was in Florida (Rec., 7038; 9119); and Westcott paid part of their cost price with currency, and Westcott paid the balance due on those bonds by his own check, in his own handwriting, drawn on his own private bank account (Rec., 7038); and that check has been discovered and is now in evidence. Moreover, the three

bonds which were sold on April 21, 1897, were not sold by Carter at all (Rec., 9171), but by Westcott himself (Rec., 7877), who invested the proceeds directly and entirely in Omaha stock, which admittedly always belonged to Westcott. (Rec., 7878.) Westcott bought that Omaha stock for $5,737.50, when Carter was in Georgia. (Rec., 7038.) Westcott paid $3,423.75 towards that Omaha stock with those three bonds (Rec., 7038; 7877), and then, when Carter was still in Georgia, Westcott paid the balance due on that stock, viz: $2,313.75, with his own personal check, in his own handwriting, on his own personal bank account; and Westcott took and kept that stock, and there is no pretense that Carter ever had or owned that stock. (Rec., 7877-78.)

In order to hide the real transaction from the court, Johnson deliberately mutilated the account of Westcott's brokers, Reed & Flagg. The facts are that prior to April 21, 1897, Westcott's account with Reed & Flagg was exactly balanced. (Rec., 7878.) On April 21, 1897, Westcott's only transaction with Reed & Flagg was the sale of said 3 U. S. bonds, for which Reed & Flagg gave Westcott credit for $3,423.75. On April 22, 1897, Westcott's only transaction with Reed & Flagg was the purchase of the Omaha stock for $5,737.50, and the use of that $3,423.75 (proceeds of the 3 U. S. bonds) as part payment thereof, and of Westcott's check for the exact balance of $2,313.75; so that the 3 U. S. bonds and Westcott's check for $2,313.75 exactly paid for said Omaha stock. (Rec., 7877-78.)

But in order to make the court believe that said

3 U. S. bonds were invested by Carter in the Orange property, Johnson picked out of Reed and Flagg's account with Westcott, the item of the sale of the three bonds, and included it on a sheet, which he marked Exhibit 239; and then Johnson picked out of the Reed & Flagg account, the item of the purchase of the Omaha stock, and the payment by Westcott of the balance due on that stock after deducting the proceeds of the three bonds, and Johnson included those items on a different paper, and marked that Exhibit 438. (Rec., 7879.) If Johnson's two exhibits are put together, so as to get the true account, it is seen at a glance that Johnson's sworn statement to the court is a deliberate attempt to mislead and deceive the court. (Rec., 7877-79.)

Johnson's Exhibit 589.

This exhibit relates to what is known as the "Attorney Account," and is an attempt to make the court believe that the bank account of Westcott was really the account of Carter.

The following are a few examples of Exhibit 589.

Johnson's Exhibit 589 is so constructed that it exactly balances at the end of it, *i. e.*, the items which Johnson puts on the debit side of the account foot up the same as the items which Johnson puts on the credit side of the account. But the fact that an account balances does not prove that it is an honest account. For instance, it is a well known fact that persons who steal from banks, etc., hide their stealings by making their accounts balance "even." An account which balances exactly at the

end looks as if it was a correct account, and gives that impression, and unless investigated and found to be crooked, it is ordinarily accepted as being a correct account.

A man who makes out an honest account puts all the debit items on one side of the account, and all the credit items on the other side of the account, and then, if the total of the debit items is different from the total of the credit items, he so states or else leaves the account unbalanced. But the usual method among those who make crooked accounts, is to make them of exactly the same total, when in fact they are of different totals. This is perpetrated by what is called "forcing balances," *i. e.*, if the debit totals are $100 more than the credit totals, the trickster adds in a false and fictitious item of $100 at some place in the account where it will not be easily seen or discovered, and then with this false item added in, the footings of the debit items are made to apear to be the same amount as the footings of the credit items, and whoever looks no further than the footings of the account, is led to believe the account exactly balances.

Johnson follows this method of forcing balances repeatedly in his Exhibit 589, as for instance:

(a) In trying to work out his theory that the fifty-five bonds, purchased under power of attorney for Westcott, belonged to Carter when they were bought in 1895, Johnson found his accounts would not come out even in one place in his Exhibit 589, unless he had additional items amounting to $5,334.78. There were no such items. But Johnson did

not stop on that account. On the contrary, Johnson deliberately invented an indebtedness from Westcott to Carter, amounting to $5,334.78, and Johnson began his account with this fictitious item, in order to make the account look at the end as if it balanced, when it did not balance. (Rec., 7712-13; 7896.)

(b) When Westcott went to Europe in January, 1895, he had a balance in his own private bank account, to his own credit, in the Union Trust Company, of $9,102.72. In order to force a balance in his Exhibit 589, *i. e.*, to make it come out even at the end, Johnson falsely represents to the court, on that Exhibit 589, that this $9,102.72 was Carter's balance. (Rec., 7716-17; 7894.)

(c) On page 8 of that same Exhibit 589, at a place where it would not be readily seen, Johnson inserted an item of $60, which he calls "probably interest allowance to Westcott" by Carter. Johnson invented this item of $60 himself, for the sole purpose of forcing a balance, *i. e.*, to make his account foot up even at the end of Exhibit 589. (Rec., 7723-26; 7896-97.)

Johnson's Exhibit 590.

Johnson's Exhibit 590 is a plausible, but worthless statement. Johnson evidently did not expect it would be attacked or investigated, because the slightest attack upon it completely destroys it.

The plan of Johnson's Exhibit 590 is as follows:

(a) Johnson first ascertains the cost price of the property Westcott gave to Carter.

(b) Johnson then gives Westcott credit for the cost price of that property, and for various fictitious items.

(c) Johnson then charges Westcott with certain items of cash received, making arbitrary selections and divisions of the true amounts, omitting real transactions, and inserting fictitious and imaginary additions and subtractions,—all as worked out in Exhibits 319 and 589,—and aggregating the forced balance which, by those exhibits, he represents to be what was paid for the property in question.

(d) And then, of course, the credits to Westcott for what the property cost are the same in amount as the charges to Westcott for the amounts thus claimed to have been invested in the property.

(e) Johnson calls that an "accounting" between Westcott and Carter. It does not take an expert accountant to determine that such a scheme is a mere juggling with figures. Everybody knows that if Westcott is charged with what certain property cost him, and is then credited with the same amount, *i. e.*, what he paid for it, the account will balance. Such an account proves nothing whatever of any use or value to anybody.

The numerous statements, which we have already seen Johnson made in his Exhibits 319 and 589, are used in making up this Exhibit 590 (Rec., 7583-7626; 7888), and for that reason it is not necessary to go over the items of those statements a second time; as Exhibits 319 and 589 are false over and over again, their lineal descendant, Exhibit 590, is necessarily equally false and unworthy of credence.

McPherson and Nelson.

These statements of E. I. Johnson and the original sources from which they purport to have been derived were carefully examined by Mr. Charles McPherson, an expert accountant of Detroit, and Mr. Robert Nelson, vice-president and manager of the International Audit Company of Chicago, both of the highest standing as men and as accountants. (Rec., 6599-6612; 7749; 7813-14; 7902; 7904.)

Mr. McPherson testifies with reference to the statements made, and the impressions conveyed, in Exhibit 319:

"Q. (Mr. Stone) If you take Captain Carter's testimony, and compare it with the facts in the case, as shown by the record, is it entirely consistent with the facts?

A. It is.

Q. If, on the contrary, you take Mr. Johnson's theory and compare it with the facts in the record, isn't it entirely inconsistent with the facts?

A. It is." (Rec., 7089.)

The Witness: "It is a misleading statement, also an incorrect statement." (Rec., 7102.)

"Q. And in order to correct it, it would be necessary for the court to examine carefully into all the facts and figures and go through the details of it, to ascertain if it was an incorrect impression, would it not?

A. It would." (Rec., 7120.)

"Q. * * * That impression is a false and misleading one, is it not?

A. It is." (Rec., 7146.)

Q. And the only way that deception could be overcome would be for the court, or some expert accountant, to go ahead and show to the

court that the impressions which that exhibit conveys are false impressions?

A. Yes, sir." (Rec., 7146-47.)

The Witness: *"If an accountant can resort to this method in reaching results, he can show a balance of nearly any kind."* (Rec., 6692.)

The Witness: *"This statement is absolutely false, and the impression it is intended to convey is a false impression."* (Rec., 6693.)

The Witness: "Exhibit 319 was made to create general impressions, independent of a careful examination." (Rec., 7096.)

"Q. * * * In making up this Exhibit 319, he (Johnson) stated in full all the facts which he thinks are favorable to his theory of the case, and then omitted entirely those facts which are unfavorable, or put some blind reference to an exhibit which the person reading would have to go and examine carefully in order to ascertain what he meant, isn't that true?

A. That is true." (Rec., 7025.)

"Q. * * * The heading there creates one impression, and when you come to investigate into it thoroughly you find that the heading is incorrect, and creates a false impression, do you not?

A. Yes, sir.

Q. Is that not true of a very large part of Exhibit 319, that the headings are intended to convey one impression, an impression which the casual observer would suppose to be the impression which should be derived, but when you come to investigate into it carefully you find the heading gives you a wrong impression, and that the heading is in conflict with the facts in the case?

A. That is true of some very important divisions of Exhibit 319." (Rec., 7098.)

"Q. *Do you find any evidence of any kind, shape or description, any paper in there, any book account, any anything, to show in the*

slightest degree that Westcott or Carter received any money from Greene and Gaynor?

A. *There is no such evidence.*" (Rec., 7173.)

"Q. Is there the slightest evidence in Exhibit 319, or in the evidence to which Mr. Johnson refers as the basis of 319, or anywhere else that you have been able to discover, which would justify an expert accountant in treating these bonds bought in 1893, in 1894, in 1895 and in 1896 as belonging to Carter at the time they were purchased, except those few bonds which are said to be, and described as, bonds which were purchased with Carter's wife's estate?

* * * * *

A. There is not." (Rec., 7435-36.)

The Witness: "*There is not a particle of evidence * * * of any dealings between Captain Carter and Greene and Gaynor as to these funds which the complainant says he received from Greene and Gaynor.*" (Rec., 7750.)

Mr. Nelson testifies that he has verified Mr. McPherson's testimony with regard to Exhibit 319, and that his testimony is correct (Rec., 7904), and Mr. Nelson testifies of Johnson's Exhibit 319:

"A. It would be misleading, and it is not true."

"Q. Take it altogether, Complainant's Exhibit 319, Division No. 6, contains various false statements, does it not, misleading statements that would mislead the court or anybody else?

A. Yes, sir." (Rec., 7863.)

"Q. * * * Would you place any reliance on any of the other statements of the same character, which follow that Division 6, if you were making up an account as an expert accountant?

A. I would check every one of them." (Rec., 7864.)

"Q. Would you place any reliance on them without verifying every statement?

A. No, sir.

"Q. If it were necessary to verify every item, it would not be of any use at all, would it, as a statement submitted for the guidance of the court?

A. Not very much, without looking into it." (Rec., 7864.)

After citing several specific instances of falsehoods in Johnson's Exhibit 319, Mr. Nelson testifies:

"Q. Mr. Nelson, have you critically examined complainant's Exhibit 319?

A. I have; yes, sir.

"Q. What was your first impression of that exhibit.

A. When I looked over the exhibit at first, the ingenuity of the thing struck me, and it looked at first glance that it appeared to be reasonable.

Q. What was your impression after you had examined it critically as to its being reliable?

A. *I lost all faith in it completely.*

Q. After having made a critical examination of that Exhibit 319, would you place any reliance on it whatever?

A. *None at all.*" (Rec., 7902.)

Mr. McPherson testifies of Johnson's Exhibit 589 (Atty. Act.):

"Q. *That* is a pure *invention* of Johnson out of whole cloth, isn't it?

A. *Yes, sir.*

Q. Then having invented that, he proceeds to imagine that whatever business Carter transacted for Westcott was Carter's own business, does he not, or substantially all of it?

A. He proceeds to treat a portion of the transactions as Carter's own business, and a portion of them as Westcott's own business." (Rec., 7596.)

"Q. Is there the slightest evidence in the record *justifying* any such assumption?

A. *There is not.*" (Rec., 7596.)

The Witness: "There was no evidence there, but it was necessary for him to assume that, to make it fit his theory.

Q. That is the only reason he did assume it, is it not, as far as the record shows?

A. Yes, sir." (Rec., 7599.)

After citing several specific instances of falsehoods in Johnson's Exhibit 589, Mr. McPherson testifies:

"Q. It shows, does it not, how that exhibit is made up, and the theory upon which it is built, *forced balances,* and *fictitious and unauthorized assumption, and so forth.*

A. *It does; yes, sir.*" (Rec., 7629.)

Mr. Nelson was questioned concerning Captain Carter's method of keeping the "attorney account" and testifies:

"Q. * * * I will ask you, as an expert accountant, * * * *if the accounts were kept as Carter states they were?*

A. *Yes, sir;* they appear to be kept as he states they were." (Rec., 7890.)

Concerning Exhibit 589, which is Johnson's statement of how the "Attorney account" was kept, Mr. Nelson testifies:

"Q. That is a false statement of the account, is it not?

A. Yes." (Rec., 7894.)

After citing several specific instances of falsehoods in Johnson's Exhibit 589, Mr. Nelson testifies:

"A. *I wouldn't attach any importance to it,* unless it was *very carefully examined.*" (Rec., 7897.)

Mr. McPherson testifies concerning Johnson's Exhibit 590:

"A. In Exhibit *590* there is a *good deal of fact,* and *enough of fiction to connect the facts, where they disconnect.*" (Rec., 6952.)

"Q. This Exhibit 590 is very largely based, is it not, upon Johnson's Exhibit 319?

A. Most of the debits and credits which appear in Exhibit 590 appear also in Exhibit 319, but all of them do not appear." (Rec., 7582-83.)

The Witness: "Wherever he covers the same transaction in 590 that he had in 319, *he makes the same mistake as to facts that he made in* 319." (Rec., 7583.)

The Witness: "The results of Exhibit 589 are carried into Exhibit 590." (Rec., 7626.)

The Witness: "The effect of those forced balances in the Exhibit 589, which is the analysis of the attorney's stub book, is to insert all of these forced balances in Exhibit 590." (Rec., 7626.)

"Q. As a matter of fact, this Exhibit 590 is gotten up solely for the purpose of supporting a theory invented by Mr. Johnson?

A. Yes, sir." (Rec., 7674.)

"Q. Is that a correct or fair way to state an account?

A. *It is not.*" (Rec., 7593.)

The Witness: "It results in warping the facts to fit your [Johnson's] theory." (Rec., 7674.)

The Witness: "It shows an effort to make the account balance, regardless of the evidence in the record." (Rec., 7593.)

"Q. Are there other occasions in Exhibit 590 where Mr. Johnson, being unable to produce a balance, invents some amount, or invents some imaginary claim, for getting rid of the difference that exists between his alleged figures?

A. There are other cases." (Rec., 7586.)
The Witness: "In at *least two other instances* he has *invented* an item to make up for the discrepancy in balances." (Rec., 7586.)

After citing several specific instances of falsehoods, fictitious items, forced balances, etc., in Johnson's Exhibit 590, *Mr. McPherson* testifies:

"Q. Take it as a whole, from the standpoint of an expert accountant, is it a statement that could be relied upon by anybody as stating the truth, the whole truth, and nothing but the truth, in this case in regard to the transactions which it purports to cover?
A. As a statement of the transactions between Westcott and Carter, or as evidence in this case, *it is not reliable.*" (Rec., 7710.)

Mr. Nelson, after having pointed out several instances of manifestly false statements by Johnson in his Exhibit 590, testifies concerning that exhibit:

"Q. * * * Would you consider his account of any reliability whatever?
A. *None at all.*" (Rec., 7888.)

All this testimony of Nelson and McPherson was given in the presence of Johnson, but Johnson was not recalled to controvert any statements they made as to any of the items in his accounts, which they showed to be erroneous, nor to defend his accounts and statements in any way; nor was any other witness called for any such purpose. In other words, all this testimony of McPherson and Nelson is uncontradicted.

Johnson's Division No. 32.

Johnson also manufactured a statement which is part of the bill of complaint for the purpose of making the court believe that Carter received some of the

profits derived from the payment of $575,479.90 to Greene & Gaynor on July 6, 1897. Johnson swore to that statement in which he set forth as the part of the profits received by Carter:

"Amount of Carter's share, "$176,691.67."

"July 8, 1897; United States 5% Bonds."

"Par value $150,000" "Cost $172,500."

"Carter's 1/3 being represented by these bonds or by cash left on deposit in account of Greene." (Rec., 85.)

And on Exhibit 319, Div. 32, Johnson swore:

"Actual amount left in Greene's account $342,-591.81."

The bill of complaint was sworn to by Johnson on August 27, 1901 (Rec., 45), and Exhibit 319 was sworn to by Johnson on February 4, 1904. (Rec., 5159.)

But this same Johnson on page 85 of the record admitted that Greene had sold 20 of those 150 bonds; and on October 18, 1900, nearly a year before that statement was sworn to, Johnson had sworn that Greene had sold 47 more of those bonds (Rec., 11958), saying, "I don't know what he did with the money," and saying with respect to the remaining 83 bonds, "I could not tell definitely where the bonds went." (Rec., 11987.) The testimony of both Nelson and McPherson is that Greene had less than $25,000 in his bank account (Rec., 7314) (Rec., 7879), although Johnson swore that it was "$342,591.61."

Other instances in which Johnson mutilated accounts and testified falsely are shown in the official record.

It was upon this record that the United States Circuit Court said of Johnson that he "has in a number of instances forced balances and drawn strained conclusions." There is nothing remarkable under the circumstances about the statement except its moderation *and that is remarkable!*

Mutilation of Westcott's Papers.

It appears from the record that Edward I. Johnson was the only person who had charge of Westcott's check-stub books and other papers. On examining the stub book "from July 20, 1894, to January 26, 1895," it appears to be in a "mutilated condition" (Rec., 7439). That stub book was examined carefully by Mr. McPherson, who testifies with regard to a number of the stubs that they did not come out of the book from which they purported to come (Rec., 7449), nor did any of the "fifteen checks or more" come off any of the stubs from which they purported to come. (Rec., 7457.) These are shown by tints and watermarks on the paper (Rec., 7461), etc. (Rec., 7476).

Further, it appears that numerous figures and notations were placed in Westcott's stub book after the original entries were made; proved in one case by the fact that one check stub had been removed and not noticed by those who were forging the entries so that their new entries were carried forward and put on the next check instead of the check on which they ought to have been placed. (Rec., 7537.) The details of the mutilations and forgeries in Westcott's check books are given in the testimony of Charles

McPherson. (Rec., 7439 *et seq.* See also Rec., 6191 *et seq.*)

UPON FACTS ESTABLISHED NO RECOVERY AUTHORIZED.

With the facts established that there is no testimony to show there was any claim even, of illegal or fraudulent profits on any material except brush mattresses, and the overwhelming evidence that the prices paid for these brush mattresses were the usual prices therefor prevailing in that district at that time, and that no larger amount of brush mattresses was used than was necessary to secure efficient results, and that insofar as brush mattresses were substituted for other material there was no important increase of cost to the Government, if any increase at all, by reason of the saving of other material for which substitution was made, and that in consequence there were no excessive profits, and could not have been, except as the result of *peonage*, or the oppression of labor, and the further fact that the amount of such profits arising to the contractors is not shown, and in the language of the trial judge "can never be ascertained," but was, in his opinion, "relatively speaking" not " a considerable portion" of the whole amount of profits, coupled with the fact that there is no testimony except these unreliable, false, and perjured statements of Johnson, largely based on inferences from inferences drawn from "coincidences" alone—("by piling inference upon inference, and presumption upon presumption," 92 U. S., 283)—to show that any money was ever paid to or received by Carter from any source, except as he himself has stated; and keeping in mind the fact that

there is no testimony to show that Carter had any knowledge of the oppression of labor by the contractors, or any power to prevent it if he had known about it, and the further fact that no matter what the facts may be as to the cost to the contractors of their labor, there could not have been any recoverable damage to the Government on that account, in view of the successful results achieved; it is impossible to find any ground for this suit, or for any part of the relief prayed for by the complainant.

And it does not alter the case in fact (except to furnish another ground for suspicion) that Westcott was either secretly or openly a partner with the contractors, for while it might be indelicate and highly improper for Captain Carter to superintend a public work in which his father-in-law was financially interested, yet that would not change the legal status or rights of any of the parties to the transaction. Proof of regularity and integrity with respect to the contract and the character of the work done under it might be more difficult to make, but when successfully made it would be as effective to protect the innocent as though no such feature or circumstance belonged in the case.

Westcott's Relations to the Transactions.

For a detailed statement and discussion as to Westcott's relations to these transactions, mentioned by Johnson, see "References to the Evidence," filed herewith, pp. 483-498; also, testimony of McPherson and Nelson, pp. 314-386 thereof; also, testimony of Hamilton, his attorney, p. 386, Reed and Flagg, his

brokers, pp. 389-390, Vanderventer, his partner, p. 388, and Robert E. Westcott, his son, p. 391.

The sum and substance of all this testimony is stated by McPherson at page 340 of the References, at the conclusion of his review of the accounts of Westcott and the statement of Johnson concerning the bonds in controversy, as follows:

> "I will state my opinion from the accounts, which show that through a series of periodical settlements, the interest coupons from these bonds were treated as the property of Robert F. Westcott, and *not* the property of Oberlin M. Carter; and of course *the conclusion is inevitable that the bonds themselves were the property of Robert F. Westcott.*" (Rec., 6661.)

Attention is also called to the following testimony of McPherson (Ref., p. 497):

> "I have in my hand the checks in the handwriting of Robert F. Westcott, made out by him personally, for at least $230,000 par value of the bonds which he delivered to Captain Carter on October 11, 1897, and October 29, 1897, and I have before me the account of Robert F. Westcott with his bond brokers, and with his bank, which show that Robert F. Westcott must have had personal knowledge of the purchase of those bonds, and of the transactions in relation to them, from the date of their purchase until he delivered them to Captain Carter in October, 1897." (Rec., 7432-33.)
>
> "Q. If he [Westcott] stated after this trouble commenced, in August or September, 1897, that he was 'surprised' with regard to these bonds, or 'surprised' that anybody had these bonds, did he tell the truth?
>
> A. *He did not tell the truth; and if he testified to such a fact, his testimony was perjury.*" (Rec., 7432.)

Captain Carter's Work.

With all this called to mind, now let Captain Carter be heard.

In the first place, who is he, or rather who was he when his alleged crimes were committed? and what did he in fact do? Not as charged in the bill, nor by this or that witness, but according to his own testimony sustained by other witnesses, and in large part by the findings of both courts below?

In connected and logical form his testimony is that in the Spring of 1876, when he was 20 years of age, he was appointed as a Cadet-at-Large to the Military Academy at West Point by General Grant upon the personal request and recommendation of R. B. Hayes, then Governor of Ohio, Judge Alphonso Taft, then Secretary of War, and the Honorable John Sherman, then United States Senator from Ohio.

He was graduated from that institution in 1880 at the head of his class, and was at once appointed to the Corps of Engineers. After a short service at the Academy he was transferred to duty at the Engineer School of Application at Willett's Point, New York Harbor. Two years later he was assigned to duty on the staff of Major General John Pope at Fort Leavenworth, Kansas, where he served as Chief Engineer of the Department of Missouri, until 1884, when he was ordered to report for duty to General Gillmore then in charge of the Fortifications and River and Harbor Improvements of Charleston, South Carolina, Georgia and Northern Florida.

He was stationed at Savannah, Georgia, and given

local charge of that work. Upon the death of General Gillmore in 1888 he was given charge of that portion of his district which comprised the River and Harbor work and Fortifications in Georgia and North Florida, although he was then only a First Lieutenant of Engineers.

We get a glimpse of the character of service he had been rendering and of his standing in the Corps of Engineers from the following extract from a report made by General Hughes, United States Army, which was published as an Official Circular by the Chief of Engineers, July 9, 1889:

> "Lieutenant Carter has labored here for between four and five years with an untiring energy and a restless activity that is seldom seen in officers of the public service. His statement that he would let his work speak for itself is no idle boast. The more critically his work is examined the greater will be the acknowledgment of his services. Pride in the profession of his choice, and ambition to make a success of the great work entrusted to him by his Government have carried his zeal to a very high pitch." (Rec., 8980-81.)

The most important of the works of which he had charge was the improvement of the 24 miles of the Savannah river extending from the City of Savannah to the ocean, so that deep-draft ocean vessels might reach the City of Savannah.

Various attempts had been made for some forty years prior to the time he took charge of it to accomplish that end, but the great difficulty in the way was that the river was crooked, and its bottom and sides were of soft mud and shifting sand.

The river spread out so wide that in most places

the water was shallow, and it became necessary to build artificial banks or walls to narrow the river in such places.

Vast amounts of mud and sand were brought down the river by the current, and this great quantity of mud and sand constantly filled up the river. This made it very expensive to dredge out the channel even enough to permit small ocean vessels to reach Savannah, for the dredging had constantly to be renewed.

Those difficulties might have been overcome by ordinary means if the bottom of the river had been of hard ground so that walls or artificial banks could have been built thereon in order to make between those walls a narrow channel which would create a current swift enough to carry out into the ocean the vast amount of mud and sand coming down the river.

But the bottom of the river, and its banks also were of soft mud and shifting sand, and if piles were driven to produce walls, there was in many places nothing to hold the piles firmly in position.

If rafts of logs, with stone on top to hold them down, were sunk to build walls, then the weight of the logs and stone became so great that in some instances they went down into the muddy bottom as much as seventy feet; and in such cases the expense of the work would have been beyond all reason.

Stone alone could not have been used for such walls, because the bottom of the river was so soft that in many places it would have been practically

impossible for stone to have ever reached a final bottom, thus making the expense of such work prohibitory.

At last he devised a plan, which was adopted by Congress in 1892, and which he carried out and completed within about three and one-half years at a cost of less than $3,500,000, and which solved successfully all the difficulties encountered and made of the work a great success, resulting in increasing the depth in Savannah harbor from 17 feet to 26 feet, and in so improving its commercial facilities that there was a saving each year to the commerce of the port of about $5,000,000, which was more than the total sum of money ever expended on the harbor. The cost of that improvement was only a fraction of the cost of similar improvements made elsewhere.

General W. P. Craighill, Chief of Engineers, United States Army, during the progress of the work in controversy, says of his work at Savannah:

> "It is one of the most successful operations of which I have any knowledge, either in this or in any country." (Rec., 3424.)
>
> "Q. And to whom is the credit due for attaining those results?
>
> A. I attribute it entirely to Captain Carter. (Rec., 3424.) * * * He deserves the greatest credit for its success, that is my candid opinion. I think all the success of it is due to him so far as I know." (Rec., 908.)

A Board of Engineers, composed of Colonels C. B. Sears, W. H. Bixby, and Thomas W. Symons, all of the Corps of Engineers, was appointed in 1898, to consider the desirability of continuing the works in Savannah Harbor as previously laid out by Capt.

Carter, and on September 28, 1898, that board reported that his work in Savannah Harbor—

> "was practically completed in 1896, at which time there was a very great improvement in the channel depth, amounting to a clear gain of about 9 feet. (Rec., 4589) * * * The execution of the existing plan of improvement for 26 feet depth. * * * has been accompanied by such successful results up to the present time that no essential changes are necessary." (Rec., 4591.)

The United States Circuit Court said in this case, having before it all the evidence ever taken in relation to that work:

> "The work was performed by Carter within the appropriation, in such manner as to secure an increase in depth of the channel of Savannah river two hundred forty feet in width at bottom from Savannah to the ocean of 9 feet, whereby that city became the second city of the Atlantic coast in the volume of its commerce. This end had long been sought for without avail. The Government engineers, almost with one accord, pronounce the work a triumph of engineering skill." (Rec., 359.)

And the Circuit Court of Appeals said it is

> "a great work in the improvement of harbors." (Rec., 13423.)

Having successfully completed the work at Savannah in 1896, the Congress authorized the undertaking of new works at the mouth of the Savannah river, and at Cumberland Sound, Florida; the former to cost nearly $1,000,000, and the latter to cost more than $2,000,000.

A Board of Engineers was appointed to prepare the plan for the Cumberland Sound work, but the plan for the Savannah work was prepared by Carter.

Both plans were approved by the Department. Those works were to be done on the general plan which had been so successful in Savannah harbor under the 1892 contract, and the specifications having been approved by the Chief of Engineers, Carter entered into contracts for those new works on October 8, 1896, at prices approximately the same as those estimated by the Board of Engineers for that work.

After those works had been started Carter decided to apply for a transfer to other work, in order to become familiar with all the various kinds of work under the care of the Corps of Engineers, and in March, 1897, applied for relief from his duties at Savannah.

The success of his work had been such that when he asked to be transferred to other duty, President McKinley sent for him and told him that as an appreciation of his work at Savannah, he had cabled to Mr. Hay, our ambassador at the Court of St. James, his desire that Carter be appointed military attache to the American Embassy in London, which appointment was made; and shortly afterwards President McKinley appointed him also a member of the Nicaragua Canal Commission.

Immediately following, and while he was in Europe on duty, charges were made against him by his successor, Captain Cassius E. Gillette, an officer of little experience in such work and junior to Carter in rank. This led to the Court martial where he was convicted in the way already mentioned for defrauding the United States in the execution of work which he had every reason to believe was a

great credit to him and to the Corps of Engineers to which he belonged.

There was never any claim that he was short in his accounts; never any claim that he did not pay out for harbor work the money he reported he paid out; never any pretence that he paid for any work not done, or that he paid more than the contract price therefor; nor was there ever any pretence that any of the Government's money was missing.

The charges against him were that he permitted the contractors for the work of which he had charge to do their work in a manner not authorized by the contracts, and it was alleged that in this way those contractors made large profits, thus defrauding the United States.

There was no claim that the contracts were not awarded by the Chief of Engineers to the lowest bidder in open competition therefor; nor was there any claim that the prices paid were higher than the market price, or higher than the price paid by Colonel W. S. Stanton of the Corps of Engineers for similar work at the same time and in the same locality, namely, at Winyaw Bay, S. C., or materially higher than the cost of the very work in question, as estimated by a Board of Engineers, especially convened by the Chief of Engineers to consider the subject of costs, etc.

The two main charges were:

(1) That in sinking rafts, or mattresses, composed of artificial brush logs, and which were used for the purpose of constructing the foundations of jetties or training walls, he sank those rafts several

at a time instead of one at a time, and that this constituted fraud; and

(2) That in asking for proposals for the work he asked that bids might be submitted for those rafts or mattresses by the square yard instead of asking for bids by the cubic yard for the artificial brush logs composing those rafts or mattresses, it being alleged that this action increased the cost of those mattresses by "about 300 per cent."

Some other criticisms of his methods were made, but the foregoing two charges are the most important.

In view of these charges and the action of the Court Martial the following facts should be stated:

On the South Atlantic coast there is no stone, the land is low, and the river and sea bottom are muddy or sandy.

Nearly all the rivers of that locality in their natural conditions contain at various points bars or shoals of mud or sand which obstruct their navigation; and the entrances from the sea to all of the harbors on that coast are more or less obstructed by shifting sand bars which must be removed in order that those harbors may be entered by deep draught ocean vessels.

Among the most important harbors of the South Atlantic coast requiring improvement were those of Savannah, Georgia, which city received its name from the low plains or "savannas" of that locality; and Cumberland Sound, which body of water affords entrance to the harbors of Fernandina, Florida, and

St. Mary's, Georgia. Both of those harbors were under Carter's charge.

Savannah Harbor consists of the 24 miles of the Savannah river lying between the city and the sea. The banks and the bottoms of the Savannah river are of sand or soft mud, and the stream even at the time of lowest water is always turbid. When the velocity of the river current is swift the flowing water carries immense quantities of silt and sand in suspension, but whenever that velocity is lowered the suspended sediment sinks to the river bottom. In the narrow parts of the river, or where the channel ran close to the banks in concave bends, the velocity of the current was great and there was a good depth of water; but where the river was wide, or where the channel crossed from one bend to another, the velocity of the current was lowered and the sand and mud were deposited, forming shoals known as "flats" which obstructed navigation.

Deep cuts wide enough for the passage of ocean vessels were dredged across those shoals, but while such work gave temporary relief, it did not remove the cause of the shoaling, and the dredging had to be done over and over again, in some instances several times during the same year. The obvious method of permanently improving the river was to construct new banks for the river, where the existing banks were too far apart.

The method Carter followed at Savannah, and which led to such successful results, was practically to canalize the river from the city to the sea; that is, to build on one or both sides of the river, where

necessary, structures called "training walls," so that the river in its improved condition might have a funnel shape, increasing in width from the city toward the sea in such a manner as to give practically a uniform current velocity for the outward or ebb flow, which velocity should be sufficient to carry seaward the mud and sand held in suspension in the water, and thus prevent the shoaling which had taken place in the unimproved river.

In a fresh water stream, where the current is always in one direction, this is a comparatively simple matter, but in a tidal estuary, such as the Savannah river, where the fresh water flow is very small in comparison with the tidal flow, the problem is very difficult, for the reason that if the training walls be built too far apart or too low, they will not concentrate the ebb flow enough to give a current velocity sufficient to scour out the shoals or keep them free from deposits of mud or sand, while if those walls be too close together, or too high, they will so obstruct the incoming or flood flow that the tidal reservoir will be diminished to such an extent that there will not be volume enough on the outward or ebb flow to keep the channel scoured out, and the river will thus soon be ruined, as many rivers have been ruined by such practices.

That the walls Carter built were properly located is shown by the official report of Colonel J. B. Quinn of the Corps of Engineers for the year 1903, nearly 8 years after Carter's work had been completed, who states that the river now keeps itself not only substantially free of the vast amounts of mud and sand which constantly pour into it, but that, in ad-

dition thereto, the bottom of the river has actually scoured out more than a million cubic yards between the training walls. Colonel Quinn says:

> "In the North Channel between the years 1894 and 1900, there was a resultant scour from the city to Tybee Roads of one million cubic yards, whereas in the South Channel, where no jetties had been built, there had been a fill of about the same amount in the same time. * * * The harbor * * * has been improving materially by scour produced by the jetties." (Rec., 8259-60.)

The general method of improvement having been determined upon, the next question was to determine the materials of which those training walls, etc., should be built, and the manner of their construction.

Where there is firm bottom, ordinary broken stone (which is imperishable) forms a most excellent material for constructing dams or jetties. Usually it can be towed on barges to the site of the work and then thrown overboard along designated lines until the structure attains the desired height, and the work can be done cheaply and quickly. But at Savannah, and at Cumberland Sound, stone alone could not be used, for the reason that it would settle into the soft bottom to such an extent as to require enormous quantities thereof, thus making the cost of the structures almost prohibitory.

The Dutch engineers, who were confronted with similar difficulties on the sandy coast of Holland, had solved the problem by using brush for the foundation of such structures, and as the entire South Atlantic coast abounds in brush, it was de-

'cided to adopt that material for use at Savannah and at Cumberland Sound.

When brush is put into suitable shape and used on the bottom of a river such as the Savannah, or on an ocean bar such as that at Cumberland Sound, the sand or mud which is in suspension in the water drifts into that brush and fills it up so that there results a huge mound of mud and sand whose matrix is of brush, and upon which foundation a superstructure of stone can be placed, which will not settle into the bottom, as the stone would have done if it had been placed directly on the ocean or river bottom.

But there exists on the South Atlantic coast an enemy of brush, known as the ship worm (*teredo navalis*) which soon destroys any exposed brush, so that great care has to be taken to see that the sand or mud at once covers the brush, else it will soon be destroyed; but once covered with mud or sand, the brush is imperishable.

The materials used by Carter's predecessors were too heavy, and sank too deep into the mud. Rafts of round logs could not be used for the desired walls, at least where there was any current, because those logs had spaces between them which permitted the water to get between and behind the logs, and thus cut out the mud and sand, so as to cause great settlement.

Carter therefore planned to take brush, and to put it into a rack and bind it every two feet of its length with tarred rope until there were produced artificial logs, say 15 feet long and 12 inches in

diameter. Such artificial brush logs are called in engineering parlance "fascines." A large number of those artificial brush logs were then laid side by side on small poles, forming a grillage, and on the top of those artificial logs were placed other small poles, forming another grillage, and the entire structure was then bound together with wire into a raft. This was called a "brush-log mattress," or a "brush-fascine mattress."

A mattress of that character was then put in the water over the place where it was desired to build a wall, and just enough stone was thrown on top of that mattress to sink it to the bottom and to hold it there temporarily. The sand and mud in the water drifted into those brush logs and filled them until they became a solid mass of brush and sand. Another mattress was then brought to the same place and was sunk in the same way with a load of stone to hold it down on top of the first mattress. Other mattresses were then sunk on top of those until the wall reached the desired height, and until there were, say, as many as eight mattresses altogether, one on top of the other, each covered with a load of stone to hold it down until it was full of sand and mud.

Carter soon found that he was confronted with the same difficulty that had baffled his predecessors, *i. e.*, the wall was too heavy, due to the fact that each mattress had a load of stone on it. After months of experimenting he found that if eight mattresses were piled on top of each other on a big barge, and were fastened together and then dumped from the barge into the water above where they were to rest, their own weight (and the sand and

mud in the water which they would catch) would almost sink the entire structure and hold it in place; and he found that the amount of stone necessary to sink one mattress would sink the eight mattresses, if they were thus fastened together.

This made a very great difference in the weight, by using only one load of stone to sink eight mattresses, instead of using one load of stone for each mattress. The result was that when eight mattresses were fastened together and sunk with only one load of stone on them, they did not sink down into the mud as far as they would if they had been sunk one at a time with a load of stone on each mattress.

Not only was the result of this plan of sinking mattresses eight at a time, or in a "multiple," as it was called later, a great success, but it took only one-eighth as much stone as would have been required if the mattress had been sunk one at a time. The saving of that stone was a saving to the Government of $737,500 on the Savannah work alone (Rec., 8053) and resulted as found by the trial judge in a loss to the contractors of the profit on that stone which the Government witnesses admit would have been as much as $275,000. (Rec., 372.)

But there was another and greater saving to the Government due to that method of sinking mattresses in multiple, which is as follows: If eight times as much stone had been used, *i. e.*, a load of stone on each mattress the weight of the extra stone would have sunk the mattresses much deeper into the mud, and then in order to build the walls high enough, it would have taken more mattresses to make up for the sinking into the mud. Expert en-

gineers of the highest standing testify that it would have taken at least another million dollars worth of mattresses in Savannah Harbor to make up for the extra sinking into the mud which would have resulted if each mattress had been sunk singly with the necessary load of stone to hold it in place. (Rec., 2626-27, 8055, etc.)

Another change of great value to the Government resulted from sinking mattresses in multiple, as follows: The poles used to bind the artificial brush logs or fascines together into rafts or mattresses are not as valuable as the fascines themselves (Rec., 8508, 2821) but if the mattresses be sunk singly, these poles must be used, else the fascines would not hold together in raft shape; but when mattresses were built and sunk in multiple many of the poles, called grillage poles, could be omitted and their place supplied by extra fascines, as was done. (Rec., 8056-58.)

Artificial brush logs or fascines had often been used in harbor work, and so had rafts of fascines, called mattresses; but this was probably the first time such mattresses had ever been sunk in multiple, and it was due to this, more than to any other one thing, that the work was completed so successfully and so economically, and so the court found that their use was "judicious and essential." (Rec., 373.)

Great difficulties were experienced in sinking mattresses eight at a time instead of one at a time. If sunk one at a time, all that was necessary was to tow the mattress in the water to the place where it

was to be sunk, and then throw a load of stone on it, and down it went. But if sunk eight at a time, it was necessary to construct a large ocean-going barge, and to build the eight-course mattresses on the barge, and then sew them together with about 23,000 feet of wire, and then tow the big barge to the place of sinking, which for a large part of the material was as much as 95 miles. As the eight-course mattress weighed from 150 to 200 tons, and was often 100 feet long, 50 feet wide and 12 feet high, it was very difficult to move, and the problem of getting that huge structure off a barge into the water exactly where it was to be sunk was not an easy one.

Colonel Abbot of the Corps of Engineers testified they tried it at Charleston, South Carolina, but could not succeed (Rec., 814); and Colonel Townsend of the Corps of Engineers, who had large experience in that kind of work, testified he did not believe it possible to sink such mattresses in such manner until he saw how it had been done at Savannah. (Rec., 2982-83.)

It took ocean-going tugs and all kinds of costly contrivances to do it, and it took a long time and many costly experiments by the contractors before they learned how to do it. Finally they succeeded, but even then at a greater expense per mattress than if they had been permitted to do the simple work of sinking one mattress at a time. None of the expense was borne by the government, but all of it was borne by the contractors.

The sinking of eight mattresses at once, and the

successful results due thereto, at a saving to the government of $737,500 in stone and of more than $1,000,000 in extra mattresses, and at a loss to the contractors of the profits on that stone and on those extra mattresses, merely because it apparently modified the technical features of the specifications, was heralded far and wide as a gigantic fraud upon the United States!

But as we have seen both courts below held that the use of multiple mattresses was in reasonable and just accordance with the contracts, and was a proper and wise exercise of discretion under the contract.

Another way in which a large sum of money was saved to the Government was in the manner of paying for brush mattresses by the *square* yard, as was customary on the South Atlantic coast. Brush fascines alone cost $1.60 a cubic yard, and this is admitted to be a fair price. (Rec., 371.) There were 9 or 10 fascines, each one yard long, in each cubic yard of fascines, thus making such fascines cost 16 cents for each yard in length. As it took 6 of such fascines to make a square yard of multiple mattress, the fascines alone in each square yard of mattress would have cost 96 cents, and as the cost of manufacture of fascines into mattresses was 23 cents per square yard, the mattresses would have cost $1.19 per square yard, if they had been bought in that manner. (Rec., 371.) By advertising for bids for manufactured mattresses by the square yard, and securing them at only 95 cents per square yard, there was a saving to the Government of 24 cents per square yard, or $327,256.28 on the mattress used at Savannah alone!

It has been shown that on this point Captain Carter was specifically and fully upheld by the lower courts.

Another method adopted which enabled Carter to make a success of the work was to require bids at the same price for *three designs* of mattresses of equal cost, so that in case one design should become unsatisfactory, two others were available to the Government at the same cost.

That method of purchase was approved in writing both by his Division Engineer and by the Chief of Engineers, and had been in use for many years; but in 1897 Captain Gillette attacked that method of purchase on the ground that the third design of mattress (which was most largely used) was cheaper to construct than the other two designs.

His charge, which was not sustained by a single reputable witness, was refuted by many officers of the Corps of Engineers, civil engineers and competing contractors, and by both courts below.

It was desirable that the brush used for making the artificial logs or fascines should contain as many leaves and twigs as possible, so as to collect the greatest amount of sediment, yet at the same time, it was necessary that the engineer should have the power to require the contractor to do such trimming of the brush as would be necessary to make it suitable for convenient handling, etc., hence the specifications required that the brush should be "well trimmed." Every engineer and contractor understood just what those words meant, just as every orchardist would understand what it would mean

if the trees of an orchard were required to be "well trimmed." Certainly it would not mean that every limb should be cut off, but Carter's enemies seized on the words "well trimmed," and claimed that it meant that every vestige of the brush should be trimmed away, and the fascines reduced to bundles of bare poles, but it was established that no engineer ever used any such fascines in harbor work, and that the use of such fascines would have made the work a failure, and both courts below held that Carter's action in this respect was proper.

About the time of the completion of this great work Carter visited Europe and inspected and studied with care many of the most important works of river and harbor improvement, with the view of fitting himself still better for the work he had to do. He also inspected the works at Sault Ste. Marie canal, on the Kanawha river, and many other important works of canal or river and harbor improvement in this country.

Under orders from Washington, Carter then prepared plans for an extension of the improvements at Savannah, and for the improvement of the ocean entrance to Cumberland Sound, at Fernandina, Florida, the latter plan being referred to a Board of Engineers, consisting of six officers of the Corps of Engineers, who prepared the plan upon which the work was done, and who estimated the cost of the brush mattresses at $1.00 per square yard. (Rec., 13200.) Contracts for some $3,000,000, covering those two works, were let by the Chief of Engineers in the fall of 1896, the lowest bidders being the Atlantic Contracting Company, the same company which had

successfully executed the work under the "big contract" at Savannah.

Shortly after those two contracts were let, Carter sought and obtained a transfer to other duty, and as already stated, was appointed military attache at the Court of St. James and member of the Nicaragua Canal Commission.

To show his record and standing at this time attention is called to the statements from two of the most distinguished officers of the United States Army:

General W. P. Craighill, Corps of Engineers, Past President American Society of Civil Engineers, the Division Engineer in charge of Carter's district or the Chief of Engineers, during the entire time Carter had charge of work at Savannah, testifies as follows:

> "I never saw a man more interested and enthusiastic about his work, who seemed to be more familiar with the details, and who seemed to exercise more care in the conduct of it than Captain Carter. (Rec., 908.) * * * I was with Captain Carter a great deal, and had the most favorable opinion of him, not only as to his abilities, but as to his integrity. (Rec., 904.) * * * He was a man of unusual ability, of great devotion to his work, a very ambitious man who took a great deal of interest in his work, very enthusiastic in the execution of it, and a student of other works for the purpose of carrying on efficiently his own work, and he had my entire confidence in every particular. (Rec., 3425.) * * * And I am free to say that I have not lost that confidence in him yet." (Rec., 904.)

General George B. Davis, the present Judge Advo-

cate General of the Army, stated as follows in an official report made in November, 1897:

> "Captain Carter was an officer of seventeen years' service, all of which had been rendered in the Corps of Engineers. He had always been regarded as an officer of great zeal and intelligence and of unusual capacity. By the energy and ability which he had shown in the prosecution of the important undertakings which had been committed to his charge he had earned the approval of his superiors and had established an enviable reputation in the honorable Corps to which he belonged. This is indicated by his selection to represent his Department as Military Attache in London, and by his appointment as engineer member of the Nicaraugua Canal Commission. His professional and military standing at the beginning of this investigation were of the highest, and his reputation for integrity was without stain."

Carter's Financial Transactions.

Such were his record, his standing and his work.

What now were his financial transactions?

In the most careful, methodical and detailed manner he has accounted for every dollar of money or item of property or securities that he ever received. Concurrently he made written memoranda and kept a diary in which practically the whole story is told in such way as to need but little explanation to make it entirely intelligent and satisfactory to any unbiased mind, and that explanation wherever needed has been given by his testimony.

These statements, supplemented with his testimony and a general knowledge of the facts that have been established, are sufficient of themselves to refute the

charges that have been made against him, but it is not necessary to rely on these entries and his testimony alone.

Nelson and McPherson, the expert accountants, not only examined the statements and reports of Johnson with the result already shown, but they examined all bank and broker's accounts, checks, books, and other papers in evidence, and at the same time and in that same connection the written memoranda and the entries of Carter in his diary, and his testimony with respect thereto.

McPherson's and Nelson's Statements and Testimony.

From those memoranda and from the undisputed documentary evidence of the complainant, Charles McPherson prepared defendant's exhibits 96-A, 96-B, 96-C, 96-D, 96-E, 96-F and 96-G (Rec., 6612-13 and 9549-9603), which give the amount and source of all the money Carter ever had, over and above his authorized salary and allowances.

McPherson testifies that he examined Carter's diaries and memoranda and that he prepared the exhibits named (Rec., 6612-13); that he "tested the accuracy" of Carter's diaries and memoranda; and he says "I have every reason to believe that they are correct statements" (Rec., 6739-40). He testifies further that he bases his final conclusions, not upon Carter's diaries alone, but "upon tests" which he made, saying that "if these memoranda were incorrect, why then of course you would know it" (Rec., 6728); and he states

further that he is positive "no one of those diary entries was created to reach that balance, because they were in existence before the purpose for which they were used was known" (Rec., 6642).

Robert Nelson testifies that he also tested the accuracy of Carter's entries, and says "I have no hesitation in saying that these are true statements" (Rec., 7906).

McPherson testified concerning these 96-A, etc., Exhibits showing the money Carter had, that they show all the "funds which he had" (Rec., 7768), and that "he did not" have any other money (Rec., 7777). Saying further "there is not a particle of evidence" that Carter had any dealings whatever with Greene & Gaynor. (Rec., 7750.)

McPherson further testifies that whenever Johnson's testimony or exhibit disagrees with McPherson's 96-A, etc., exhibits, "it is wrong." (Rec., 7773.)

Robert Nelson testifies that the exhibits 96-A, etc., are correct, and that if he found any exhibit or testimony of Johnson in conflict therewith he would not consider Johnson's account "of any reliability whatever." (Rec., 7888.)

McPherson testifies further that there is no evidence whatever to indicate that the securities the complainant now contends were Carter's, were in fact Carter's, saying that they were purchased "by Robert F. Westcott for his own benefit" (Rec., 7433), and that there is not "the slightest evidence" that any bonds except those belonging to the estate of Carter's wife belonged to or were treated as the property of Carter. (Rec., 7436.)

Passing now to what actually occurred, it is shown by the testimony that Captain Carter in October, 1890, married the daughter of Mr. Robert F. Westcott of New York. Mr. Westcott was a very wealthy man. The trial Judge said of him:

> "It is shown that Westcott was a very wealthy man, and a very active business man prior to his retirement sometime prior to 1897; that he had given one of his daughters $70,000, and that Mrs. Carter was a favorite with him" (Rec., 383-4).

The trial Judge said further concerning the transactions of Westcott during the period in question, "There is no pretense but that Westcott was handling large sums of his own." (Rec., 388.)

According to the testimony he became very fond of Carter, particularly after the death of Mrs. Carter, which occurred at Savannah December 7, 1892. Mr. Westcott had been unfortunate in his relations with his son, Robert E. Westcott, and repeatedly told Captain Carter that he had transferred to him his affections for his son, and that it was his wish Carter should not remarry, but remain single and be a son to him in his old age, and that if Carter did so he would give to him the share of his estate that would have gone to his daughter if she had outlived him. His regard for Carter was of such an affectionate character, and he so openly manifested it, that he never met Carter or parted company with him for any time, without throwing his arms about his neck and kissing him. (Rec., 5712-13.) There is no contradictory testimony on this subject.

Is it any wonder, or a fact that needs explanation, that Mr. Westcott, in view of his ability and his re-

gard for Captain Carter, should have made generous gifts and advancements to his daughter while she lived, and that he should have continued these gifts and advancements to Carter after her death?

Would it not have been unnatural and even unreasonable if he had not done so? He might have done more than he did without exceeding what might have been expected.

1891.

The testimony shows that in October, 1891, one year after she was married, Westcott made his first important advancement of $50,000 to his daughter.

This was noted at the time in Carter's diary (Rec., 9553) (Memoranda; Rec., 5375) (See also the testimony of McPherson, Rec., 6620; and of Nelson, Rec., 7846-54).

There is no contradictory testimony.

1892.

The next sum advanced by Westcott was $2,500 given to Captain Carter June 8, 1892, to enable him to give an entertainment at West Point. (Rec., 5995; 5463, Diary; Rec., 9050.)

There is no contradictory testimony.

His next advancement was made to Carter December 13, 1892, after his daughter's death, to assist him to defray funeral and other expenses. (Diary and account; Rec., 9552.)

There is no contradictory testimony.

After the death of Mrs. Carter, in December, 1892, Westcott resumed possession of her estate but after-

wards fully accounted for the same to Carter and paid it all over to him, the final balance being paid by check of May 2, 1893, for $489.86. (Rec., 5470; 5518-23; 6646; 9552-61.)

1893.

No other payment, gift or advancement of money or property was made by Westcott to Carter until June 8, 1893, when Westcott made a present to Carter of 35 shares of Savannah Tow Boat stock, that had cost $3400.

This stock had been originally purchased by Mrs. Carter and had been taken up by Westcott in the settlement of her estate, and had been retained by him when he settled with Carter for his wife's estate by the balance check of $489.86 on May 2, 1893. (Rec., 5470; 5518-23; 6646.)

This was a gift prompted by the source from which the stock had come to Westcott and by the fact that the company issuing it was located at Savannah, where Carter was stationed. (Rec., 9562.)

There is no contradictory testimony.

During the remainder of the year of 1893 Westcott advanced, gave, or paid to Carter or on his account altogether only $3,115, as follows:

Aug. 8, 11,	$565	(Rec., 9562.)
Sept. 18,	1,050	(Rec., 9563-4.)
Nov. 15,	250	(Rec., 9566-7 on account of portrait of Mrs. Carter.)
Dec. 21,	1,250	(Rec., 9569, balance on portrait.)

It will be noted that $1,500 of this sum of $3,115 was for a portrait of Mrs. Carter, and it will be fur-

ther noted that all the contracts of 1891 had been completed long before Westcott ever gave Carter a dollar, and that the work under the big $3,000,000 contract for the improvement of Savannah Harbor had been in progress with all the conspiracy and fraud in full swing, according to the allegations of the bill, for more than fourteen months!

The sums Carter's wife and he received prior to March 5th, 1894, when Westcott next advanced money to Carter are so modest in amount and so fully noted in Carter's diary and memoranda, and so fully explained in Carter's testimony as to be sufficient of themselves to refute the charges of conspiracy even if they were controverted; but surely they are sufficient in view of the fact that outside of the reports of Edward I. Johnson there is not a word of contradiction in the testimony as to any of those items.

From the foregoing it follows necessarily that Carter could not have received any fraudulent money from Westcott prior to 1894, and it is also equally clear that Westcott could not have been receiving large payments from Greene and Gaynor on Carter's account. Had any such payments been made to Westcott for Carter in pursuance of a conspiracy to which Carter was a party, Carter would have known of the same; and the accounting and settlement that occurred between Westcott and Carter would not have been of Carter's wife's estate as it was, but of their respective shares or divisions of the spoils.

1894.

During the year 1894 Westcott paid or advanced to Carter in all the sum of $10,000. This amount was

not large under the circumstances and therefore should not need explanation, but Carter's diary and testimony show on what account and for what purpose each item of this account was paid to him, and there is no testimony that contradicts what he says in that respect; and all that he says, in view of the conceded and established facts, is so consistent with innocence and so natural as not to call for elaboration. If the court should desire to learn the details they will be found in the record, pages 9570-77, 5561, 5584; Carter's diary, pages 9095, 9121.

No one pretends there is the slightest evidence to show that Carter got during this year 1894 a dollar from Westcott or from any other source except only his salary and the income from his wife's estate, in addition to this sum of $10,000, but during this same year of 1894, according to the allegations of the complainant's bill, there was paid to Carter, or to Westcott for him, as his one-third share of the so-called fraudulent profits the sum of $253,447. (Rec., 22.)

Again, it would seem true, as said by the trial judge, as to the $16,000 charged in the bill to have been "traced to Carter from the contracts of 1891" by "coincidences" in bank accounts, either that coincidences are very unreliable and misleading, or that Carter was badly imposed upon by his father-in-law and co-conspirators.

This brings the account to

1895

At this time Westcott was about 70 years of age. He had a daughter, Mrs. Conquest, ill with pulmonary

trouble in Southern Italy. She was there alone with her children. He and Mrs. Westcott planned a trip to visit her and care for her during her illness. They left with the intention of remaining with her as long as might be necessary. Westcott expected, therefore, when he left to be gone a year, or perhaps two or three years, or even longer. He had no plan as to just when he would return. They left January 29, 1895, and did not return until May 11, 1896. They were gone, therefore, a little more than fourteen months. In view of this contemplated protracted absence, and the uncertainty of life for a man of his years, he made careful arrangements with respect to his business and some dispositions of his property. Among other preparations he left with Captain Carter a general power of attorney to transact for him during his absence all kinds of business that it might be necessary to transact in order to protect his interests and keep his funds invested. The power of attorney he gave Captain Carter authorized him to buy and sell bonds and buy other bonds with the proceeds of sales, to draw checks in his name, sign his name to all kinds of business papers, to collect rents, make leases and deeds of conveyance to property.

He took another step in part performance and fulfillment of his promise to Carter and made an advancement to him on account of the share that Carter's wife would have been entitled to receive of his estate, had she survived, by making to Carter a gift of what is known in this record as the Eighth avenue property, for which he had paid out of his own

money, as the record shows, $39,818.75. In addition to this he authorized Carter as a gift and as a payment to him for the service he was to render as his attorney in fact in the management of his estate, to draw and use of his money at the rate of $1,000 per month. (Rec., 11269; 11271; 9577; 9581.)

There are a number of things to be noted in connection with this transaction that are in and of themselves arguments against the claim of conspiracy, fraud and corruption contended for by the government.

In the first place, the big $3,000,000 contract of October 22, 1892, was nearing completion; it was entirely finished and the last payment by Carter on account of it, with the exception of a small balance withheld for final settlement, was made July 5, 1895. Not only was this large contract for the improvement of Savannah Harbor thus completed, so far as Carter's connection with it was concerned, by the payment of money on account of it July 5, 1895, but at that time all the other contracts that had been let by him of the entire fourteen were finished, except only the two that he subsequently let October 8, 1896, from which both courts held neither Carter nor Westcott ever received any money.

It will be noted, therefore, that the payments which Westcott authorized Carter to make to himself for managing his business during his absence went on without regard to the contract, and continued, month by month, through the entire year, although from July on there was no contract being performed from which Carter or anybody else for

him could fraudulently or otherwise derive any profits or money of any nature.

It will be noted also that the testimony shows that all the bonds, stocks, securities and property of every kind, character and description that Westcott had or ever had had, which still remained in his possession or under his control, were during all this period of 1892, 1893, 1894 and 1895 in his own name, and that the income therefrom in the way of coupons or other forms in which it may have arisen, went to him for his own use and benefit, the record showing that all coupons, interest and other revenue collected either by him in person or during his absence by Carter, as his attorney in fact, was passed to Westcott's credit in bank and used by him for his own private purposes, and not a dollar of it, except only as hereinabove indicated, was paid to Carter in any way or on any other account. (Rec., 7429-36.)

It is confidently submitted that in view of the situation as it presented itself in January, 1895, considering Mr. Westcott's years, his ability to make provision for his son-in-law, his confidence in him and his affectionate regard for him, and his contemplated long absence, with all the uncertainties of life, increased by his age, it was not unreasonable for Westcott out of his abundance and in fulfillment of his promise and in accordance with the promptings of his heart, to make to Captain Carter the gift of the Eighth avenue property and pay him for the services he was to render him, the allowance of a thousand dollars per month.

It should also be noted that it would be an ex-

tremely unreasonable and improbable transaction for Mr. Westcott to employ Carter as he did, putting the control of all his property so absolutely in his hands, if he had any question whatever of Carter's integrity, as he would necessarily have had if he had been aware of any fraudulent conduct on the part of Captain Carter.

In this connection attention is called to what Mr. Westcott said to his brokers when he introduced Captain Carter to them as the man who would act as his representative during his stay in Europe. Mr. Flagg said:

> "A. Mr. Westcott came to us at the outset and introduced Captain Carter, saying that he was his son-in-law, in whom he had implicit confidence, and that he had given him full power of attorney to transact all his business, and that we were to recognize him in his stead, and do any business for his account that Captain Carter said." (Rec., 2380.)

Mr. Reed said:

> "Mr. Westcott then informed me that he wished Captain Carter to represent him during his absence, and expressed to me and to my firm unbounded confidence in Captain Carter's loyalty to him, his integrity,—and stated that he would do everything for him as if he were here himself. * * * I never did from the first to the last any business with Captain Carter that I did not understand to be as the representative of his father-in-law, from the beginning to the end." (Rec., 888-9.)

Other witnesses testify to the same effect.

There is not a word of testimony in the entire record to show that Carter directly or indirectly, or

Westcott, directly or indirectly, received any money from Greene & Gaynor, after Westcott left for Europe in January, 1895, but on the contrary, the uncontradicted evidence shows that all the money Carter deposited for Westcott was placed in that box by Westcott before he sailed for Europe. (Rec., 6586.)

The courts below were not impressed by complainant's claim that it was suspicious because in 1895, when Westcott was in Europe, Greene & Gaynor when receiving payments divided their profits into thirds and used Westcott's third either to repay what they had advanced to Westcott, or separated his third from their own money, and put it aside until his return.

For the details of these matters, see "References," pp. 441-45.

From July, 1895, when Carter quit making payments on the big contract, with the exception of the small balance, which was held back for final settlement, there was no payment made by Carter to anybody until July 6, 1897, and during all that period there was no work in progress from which any fraudulent profits could have been derived except only the work commenced under the contracts of October 8, 1896, on which no payment was made until July, 1897, and there is not a word of testimony in the entire record to show that Westcott received or could have received after the time he left for Europe in January, 1895, any payment from illegal profits or any other source made by Greene & Gaynor.

These facts are not only established by the testi-

mony, but there is no testimony whatever to the contrary. They are conceded facts of the case, always in these statements excepting the exhibits of Edward Israel Johnson. All that is here stated as established is testified to so far as it has relation to the state of accounts and records by both McPherson and Nelson.

1896-97.

Such being the case, it is wholly immaterial what Carter may have received in 1896, or at any other time when there was no contract in progress and no source from which illegal profits could be derived in injury to the government.

But the testimony shows that during the years 1896 and 1897, down to October, 1897, Westcott advanced to Carter in all at different times and in different sums an aggregate of $31,753.07.

In view of the fact that Carter had in the meanwhile been appointed military attache to the American Embassy in London and a member of the Nicaragua Canal Commission, this was not a larger advancement than a man of Mr. Westcott's means and disposition toward Carter, augmented by Carter's increasing reputation and the increased necessity for financial assistance, imposed upon him by his new positions and duties, might have been expected to make.

But it will bear repetition that whether large or small is immaterial in view of the fact that there was no work in progress at the time and no payments were being made at this time by Carter from which

these advancements could have been fraudulently made.

Westcott's Gifts of October, 1897.

Before taking up the last chapter of this transaction it should be stated that the purpose of showing in detail all gifts and payments of money and transfers of securities and property by Westcott to Carter, is not to minimize the aggregate, but to show, in the first place, that all these payments and gifts were made under circumstances that naturally prompted them, and to negative fraudulent conduct on the part of Carter toward the government or knowledge on his part that he was receiving anything that had come by fraud or otherwise from the public works he had been superintending; and to show, in the second place, that the aggregate amount of these gifts, payments and transfers was of itself a refutation of the claim that they represented a share of profits that had been paid to Westcott by Greene and Gaynor, for the benefit of Carter, and which, therefore, Westcott was but turning over to Carter, because the amount, as will be seen, was so largely in excess of any sum Westcott could have so received from Greene and Gaynor as to make such an explanation a manifest misfit; and to show at the same time that the aggregate amount was a near approximation to what Carter had been led to suppose Mrs. Carter's share of Westcott's estate would have been at that time had she been there to take it. (Rec., 5348, 4686-7, 2406, 5713-4.)

Orange, New Jersey, Property.

In preparation for his contemplated service abroad as Military Attache, Carter, with a view to making a safe, permanent investment that would take care of itself in his absence, consummated the purchase, before that time negotiated, of the Orange, New Jersey, property, from Westcott, for the sum of $63,000, and paid for the same out of his wife's estate and what he had saved from his salary and from gifts and allowances he had theretofore received from Westcott. (Rec., 5663, 9589.)

If Westcott had been then the holder, to Carter's knowledge, of a large amount of money or securities for the benefit of Carter, there would not have been any such transaction. On the contrary, the property would have been either transferred on account or as a gift or an advancement.

The undisputed fact,—and the fact is undisputed, for there is not a word of testimony to the contrary,—that Carter made actual *bona fide* payment for this property, shows conclusively that he had no claim of any kind on Westcott of which he had knowledge, and that he had no knowledge at that time of any fraud on the part of Westcott or anyone else for the proceeds of which Westcott was accountable to him.

This conclusion is confirmed by the fact that subsequently, on the 11th day of October of the same year, after the storm had broken and while the Board of Engineers was conducting its investigations, and Carter was in need of funds with which to defend

himself, he resold this property to Westcott (Rec., 5670-84) for the same price he had paid therefor in May, nor is the good faith of either transaction affected by the fact that, when Westcott had paid for the property, learning that Carter had recorded the deed and had thus vested the title in himself of record, he concluded to make a gift of the property to Carter, and did so by the memorandum agreement signed by him and Carter in Mr. Root's office, October 29, 1907. (Rec., 5680, 11289, 11291.) As to these transactions see further, Rec., 5356, 5670-84.

But all this is confirmed by the fact that in addition to requiring a deed from Carter for the Orange, New Jersey, property, Westcott, as further consideration to him for the $63,000 he paid to Carter, demanded a return to him of the deed theretofore made to Carter for the Eighth avenue property, with which demand Carter complied. (Rec., 5672, 5688, 6281.)

Surely it needs no argument to show that if the Eighth avenue property had been regarded by Carter as anything but a gift he would not have thus returned to Westcott the deed for it without any consideration whatever passing to him therefor. Later, as above noted, Westcott made a gift to Carter of the Orange, New Jersey, property, and he also later delivered to Robert E. Westcott, with whom he had become reconciled, for Carter, a deed for the Eighth avenue property (Rec., 5684), but there is nothing connected with the return to Carter of either piece of property that reflects upon his conduct or good faith in the matter or that tends in any

sense whatever, when the facts and circumstances are known and understood, to show that he had any knowledge that Westcott had derived from Greene and Gaynor any money or any part of any money with which said properties, or either of them, had been paid for. The whole story with respect to these transactions, in so far as is necessary to be here repeated, including Carter's diary entries, will be found in the record, pages 5676 to 5684.

These gifts, allowances and advancements, excluding the Eighth avenue property and the Orange, New Jersey, property, were:

To Mrs. Carter	$ 50,000
Aggregate of all gifts and allowances to Carter in round figures	65,000
Total	$115,000

So stood the account between Carter and Westcott after the transaction of October 11, 1897, in connection with which Carter returned to Westcott the deeds for the Eighth avenue and the New Jersey properties, both of which deeds Westcott held until the transaction of October 29th, 1897. While the account stood in this way, Mr. Westcott concluded to make another visit to Europe.

Westcott's Second Visit to Europe.

Shortly before October 29th, he notified Carter and stated to him that he was old and might die there, and that he desired to carry out the agreement he had made with Carter shortly after Mrs. Carter's death, namely: that if Carter would remain with

him and not marry again he would give him what would have been his wife's share of his estate. He then requested Carter to employ some attorney to meet with his attorney, Mr. Stimson, in the office of Root. Winthrop, Howard & Stimson, to consummate the transaction. Carter in pursuance of this request employed A. J. Rose, Esq. Mr. Rose and Mr. Stimson, after some correspondence, arranged for a meeting in Mr. Stimson's office October 29th, at which time and place Westcott delivered to Carter, in the presence of Messrs. Stimson and Rose, securities, amounting to $288,325 par value and took from Carter an itemized receipt therefor, which the attorneys had prepared. Westcott also, at that time and place, delivered to Carter a deed for the Orange, New Jersey, property, as shown by the memorandum already mentioned, and later, but without notice to Carter, delivered to his son, Robert E. Westcott, for Carter, a deed to the Eighth avenue property. (Rec., 6278; 5676-84.)

Whatever may have been Westcott's purpose, the testimony shows that this transaction was had in broad daylight, in one of the most prominent law offices of the City of New York, at a time when, within a few squares of that office, the Board of Engineers was sitting engaged in the investigation of the charges that had been made against Carter and at a time when the newspapers were filled with sensational accounts of the proceedings had before that Board. No argument should be needed to show that Carter received the securities and the deed then turned over to him without knowledge or even thought or suspicion that the same had any connec-

tion with or relation to the contracts, the performance of which he had been superintending, and with respect to which he was then on trial. Why anybody should believe or expect anybody else to believe that Carter would have engaged in any such transaction with the knowledge that the property he was receiving was the fruit of any kind of fraud connected with his work or his duties, rather than believe the statement made by Carter as to what he understood the transaction to be, namely: a fulfilment of the promises made to him by his father-in-law to give him his deceased wife's share of his estate, is hard to understand. Under all the circumstances it was a natural and proper thing for Westcott to do before starting on a trip from which, particularly in view of his age, he might never return, and no more than Captain Carter under all the circumstances had a right to expect that he would do. It was not only the natural thing for Westcott to do, but what was done was in harmony with what Carter had a right to expect, and not calculated to excite any suspicion that there was anything improper in his thus publicly accepting and receipting for the property as he did, for the aggregate amount of all theretofore given him and what was given him on this occasion, was in round figures about $506,000, par value, and perhaps $560,000 actual value, most of the securities being worth a premium, or approximately the sum Westcott had given him to understand he might expect to receive as his wife's share of his estate, and a much larger sum, as hereinbefore pointed out, than Westcott's share could possibly have been of any "fraudulent" profits

paid to him on account of the contracts Carter had been superintending.

No Profits Determined.

What is herein said about the amount of profits is only a guess, but that is all any estimate of profits is that has been given in this case, whether by court or by counsel; but it is confidently asserted that what has been said herein about the amount of profits, both legitimate and illegitimate (if there were any illegitimate profits at all), has been based on grounds and facts that give some intelligent and necessary measure of the probabilities, and that the data thus employed cannot be successfully challenged. The inability to be more certain and definite is due to the fact that there is no direct or positive testimony on the subject; the whole theory as to profits and the amount of the same, being based on the idea that all money deposited by Greene and Gaynor in their New York bank account, was profit, and that whenever a "coincidence" or anything near a "coincidence" in amounts could be found in items charged to the bank account of Greene & Gaynor and credited to the account of Westcott, it was proof not only of profits, but of the division of profits with Westcott. And this kind of proof extended, as alleged in the bill, from the date when it is charged that Carter got $16,000 from the contracts of 1891, until July 6, 1897, when he made his last payment on all the contracts, the same being the first payment on the contracts of October 8th, 1896, although at the time when the alleged payments commenced no contracts were in existence, and both

courts held there were no such payments made; and notwithstanding both courts found no part of the money paid by Carter July 6, 1897, ever came into the possession of either Westcott or Carter; and notwithstanding there is no testimony to show that during all the time Westcott was in Europe from January, 1895, until May 11, 1896, there was any payment made to either Carter or Westcott (Ref., 441-5); and notwithstanding the fact that from July, 1895, when the "big contract" was practically finished, until October 8, 1896, when the last contracts were entered into, no contract of any kind was in existence, from which any profits, great or small, legitimate or illegitimate, could have been derived by anybody.

But why pursue the subject further, when it has already been carried far beyond what is necessary to show that the testimony is utterly insufficient to meet the requisites of the rules applicable to the proof of fraud and when both courts below have held every material fact in Carter's favor, thus making fraud impossible?

The case is simply and solely one of *suspicion, assertion, inference* and *assumption.*

Judge Grier described it exactly, and announced correctly the law applicable to such a case, in his charge to the jury in the case of *Turner* v. *Hand,* 3 Wall., Jr. (C. C.), 82.

He said:

> "You must remember that the burden of proof is on the party who alleges fraud. That fraud, though proved by circumstances, can

never be presumed, for fraud is a crime. It is not enough to show suspicious circumstances. Suspicion is not proof. It does not require a great deal of ingenuity to cast suspicion of fraud upon any transaction. There is a very great and sometimes grievous error into which not only the public mind, but that of jurors and judges too, are apt to fall; and which leads to false judgments, and sometimes to great oppression. I would, therefore, specially call the attention of the jury to it, and caution them to beware of it. It is this: The law abhors fraud. Every honest mind hates it, and even those who practice it themselves will join in the denunciation of it. It makes them feel virtuous for the time, and they are the most ready, from the arguments of conscience, from judging of others by themselves, to believe it true, and inveigh most loudly against it. When the clamor of fraud is raised in a community, or when it is confidently charged by counsel in a court, we are prone to see all facts through a false medium, which magnifies the importance of every fact upon which suspicion of fraud may be raised; and ignores the plainest inference against it. In the midst of our virtuous indignation against fraud, we first assume it has been committed, and then seek for arguments to confirm, not our judgments, but our prejudice. 'Trifles light as air,' then become 'strong as proofs of Holy Writ.' Circumstances which to an unprejudiced mind are just as compatible with innocence as guilt, which at best could only raise a suspicion, are set down as conclusive evidence of crime. Those who sit in judgment over men's rights, whether as courts or jurors, should beware of this natural weakness to which we are almost all of us subject. We all fancy ourselves wiser than perhaps others are willing to give us credit for. This feeling is gratified by what we believe to be superior sagacity. Rogues may be cunning, but they

can't deceive *us*. Under this satisfactory belief, we become over-astute, and often see that which is not to be seen. We suffer our imaginations to take the reins from our judgments, and rush headlong in this case after the fox called fraud. Circumstances which should avail for the proof of fraud are such only as are inconsistent with a contrary view of the transaction, and lead irresistibly to that conclusion."

THE DEFICIENCY DECREE.

The 20th assignment of errors by Oberlin M. Carter is as follows:

"That the court in and by its final decrees of March 18th, 1909, committed error in awarding a deficiency judgment against Oberlin M. Carter for $105,019.66, or for any other sum, for the following reason:

The stipulation of November 6, 1901, provides that the Carters shall not be responsible for any moneys *bona fide* paid out or pledged prior to that date (Rec., 120), and the Circuit Court of Appeals itself held that this stipulation 'resolves any possible doubt as to ultimate liability in favor of the defendants' (Rec., 13429); and all the moneys charged to this cross-appellant and going to make up said deficiency decree were paid out *bona fide* prior to said stipulation of November 6, 1901.

The record shows that all of that $105,019.66 was already accounted for by the defendants, as follows: the sum of $56,808.95 ($14,990.62 + $21,875.00 + $10,000.00 + $9,943.33) was bona fide paid out by O. M. Carter from October 12, 1897, to April 27, 1898 (Rec., 420); $2,134.18 was bona fide paid out by F. P. Blair between Nov. 5, 1890, and June 29, 1901 (Rec., 421); $33,211.99 ($5,000.00 + $6,200.00 + $5,000.00 + $2,005.27 + $2,581.72 + $10,275.00 + $2,150.00) was bona fide paid out by I. S. Carter between Mar. 21,

1900, and May 17, 1901, and properly accounted for by him (Rec., 334-35; 420-21); and the remaining $12,864.54 ($1,964.54 + $1,500.00 + $3,400.00 + $6,000.00) was bona fide paid out between Aug. 12, 1900, and May 15, 1901, by L. D. Carter and properly accounted for by him (Rec., 347, 421); hence, under the stipulation of November 6, 1901, and the written admissions of the complainant, there can be no judgment against Oberlin M. Carter for any of that $105,019.66.

[That I. S. Carter and L. D. Carter accounted for all the moneys received by them, see (Rec., 5071).]"

In the first place the decree complained of is not only a money decree but it is in the nature of a money judgment, and the decree amounts to not only a money judgment, but to an execution also, for the order is that Carter not only be denied all credits that had been allowed him by the Circuit Court, amounting to $105,019.66, but that the securities awarded him by the Circuit Court, amounting at their par value to $34,600, which the Court of Appeals affirms, be appropriated and applied as a credit on the amount adjudged against him. Such a money decree is not authorized by the nature of the bill, nor is it within the prayer of the bill.

Hayward v. *Eliot Nat. Bank,* 96 U. S., 611, 614-615.
Clark v. *Beecher,* Appendix 154 U. S., 631.
Kent v. *Lake Superior Canal R. & I. Co.,* 144 U. S., 75-92.

But there is another, and if possible a more conclusive reason why no deficiency decree could be properly rendered in this suit, and that reason is presented by the stipulation of November 6, 1901. (*Post,* pp. 13419-21.)

Under that stipulation or agreement which was approved by the court (Rec., 122), the three Carters were not to be held responsible for anything which had been theretofore in good faith disposed of.

With respect to such property as they might have theretofore disposed of in good faith, they were *not* to make an accounting as in equity, but only, according to the language of the stipulation, to "give all the information they can." (Par. 3 of Agreement, Rec., 13420.)

There was no authority in the bill or the prayer or the agreement for a money decree for the *value* of any part of the specific property sought to be recovered that had been disposed of and hence not turned over to the receiver, in any event; but certainly not in the event that they gave, in their testimony, all the information they could about it. They were, therefore, on the face of the agreement to be allowed credit for all money, bonds, stocks, or other securities, property or assets which had come into their possession which they had "bona fide paid out or pledged * * * for attorneys' fees or as expenses in defense of Carter, or expended * * * legitimately in the handling of said properties." (See paragraph 9 of Agreement, Rec., 13421.) (See also complainant's exception No. 1, to master's report, Rec., 321, where it is conceded that the Carters are not responsible for any of the assets actually disposed of prior to the agreement.)

This stipulation was the joint undertaking of all the Carters and its provisions applied to all of them alike. The credits allowed Captain Carter by the Circuit Court came all of them within the terms of

the agreement (20th assignment of errors and record as there cited).

The refusal of the Circuit Court of Appeals to affirm that part of the decree of the Circuit Court was in plain violation of this agreement, as well as unauthorized by the character of the bill and its prayer.

RECAPITULATION.

1. The bill charges conspiracy to defraud the Government.

2. The plan or scheme was for Carter to so manipulate the specifications, advertisements for bids and giving out and withholding information as to favor his co-conspirators in bidding for the contracts to be let, and thus enable them to secure the work at high, extravagant and exorbitant prices.

3. That in pursuance of this fraudulent scheme Carter let to his co-conspirators between January 1, 1891, and July, 1897, fourteen (14) specifically mentioned contracts for river and harbor improvements.

4. That according to the plan or conspiracy Carter was to allow the use of materials of inferior quality and was to accept inefficient work, but nevertheless approve and pay therefor as though of good quality.

5. That the fraudulent profits so realized were to be divided into three equal parts and one-third was to be paid to Carter.

6. That the scheme was carried out as planned; that it embraced all the contracts mentioned; that more than $2,000,000 of fraudulent profits were

realized and that approximately one-third thereof was paid to Carter.

7. That Carter from time to time, as he received such payments, secretly invested the money so paid to him in stocks, bonds and real estate, which at the time this suit was brought were held by Carter and his uncle, L. D. Carter, and his brother, I. Stanton Carter.

8. This property is specifically described in the bill and the prayer is for its recovery and for general relief.

9. There is no alternative prayer for a money decree or judgment for the value of any property that might not be recovered.

10. Both courts below held that the proof failed to show that there was any conspiracy, or that there was any irregularity or fraud of any kind in connection with the letting of the contracts that were let prior to October, 1893, or that any inferior materials were used, or that any extravagant or exorbitant prices were named in the contracts or that any money was paid out except as required by the contracts, and held affirmatively that the work was efficient and successful and accomplished the purposes intended to an exceptional degree, and that its cost was less than the estimates and the appropriations.

11. Nevertheless both courts found that the contractors realized excessive profits, and that they had paid approximately one-third of the same to Robert F. Westcott, Carter's father-in-law, and in effect that part of the money so paid to Westcott in one

form or another found its way into the possession of Carter in October, 1897.

12. That the Government was correspondingly damaged and had a right to recover.

13. The Circuit Court of Appeals, differing from the Circuit Court, held that to the extent the Government might fail to recover it was entitled to money decrees or judgments, and rendered them accordingly.

14. The Circuit Court held that Westcott was a partner of the contractors, but the Circuit Court of Appeals held it was immaterial whether he was a partner or not.

15. There is no direct proof on the subject of profits to show the amount of the same.

16. There is no direct proof to show that any payments were ever made to Westcott on account of profits or otherwise, and no proof of any kind to show that any payments were ever made to Carter.

17. The sole proof as to profits and the payment of a share of them to Westcott consists of "coincidences" in the nature of items of debit in the bank account of Greene and Gaynor, and items of credit in the nature of deposits approximately corresponding as to dates and amounts in the bank and broker's accounts of Westcott.

18. This testimony, in so far as it affects Carter, is at most only "inference on inference," and is shown to be unreliable generally, and in numerous instances to consist of "forced balances" and "strained conclusions."

19. As against this testimony it is shown, on the contrary, that there was no fraud claimed, and there was certainly no attempt to prove any, as to any material except only brush mattresses.

20. That no more brush mattresses were used than were necessary to make the work efficient and successful.

21. That the contract prices for brush mattresses were the market prices obtaining in that district at that time.

22. That it was proper and less expensive to buy them by the square yard, as Carter did, than by the cubic yard, and that such mode of purchase was in accordance with precedent and less expensive to the Government.

23. That after eliminating the contracts of 1891, and the contracts of 1896, and the amount of 350,000 square yards called for in the contract of October 22, 1892 (the big contract for Savannah Harbor), as to which both courts below held there was no proof to show fraud of any kind, there remained only 1,365,710 square yards, which cost the Government all-told only $1,218,512.82.

24. That after allowing a reasonable profit and for the cost of this material at the lowest figure named by any reputable and intelligent witness, there could not possibly have been any large amount of additional profit.

25. Whatever the amount of profit may have been, and there is no clear testimony on the subject, to the extent it may have been excessive, it is to be

accounted for by the fact that the contractors secured their labor at peonage prices, of which Carter is not shown to have had any knowledge, and with respect to which he could not have had any control if he had been informed.

26. Whatever may have been the profit arising to the contractors from the oppression of their labor, it involved no damage to the Government and gave to the Government no right to recover any part of the money paid out by Carter in discharge of its obligation on account of the contracts.

27. All the money paid to Carter by Westcott is accurately accounted for by Carter's diary entries, memoranda and testimony, and all such payments and advancements are shown to have been under conditions that naturally prompted them and that they were in consequence entirely consistent with integrity, and there is no evidence of conspiracy or fraud or wrong-doing of any kind on the part of Carter.

28. Neither the bill nor the prayer of the bill authorizes the deficiency decrees that were entered below.

29. Not only are those decrees unauthorized by the bill and its prayer, but they are prohibited by the stipulation of November 6, 1901.

30. Such being the facts, the court below should have dismissed the bill of complainant with costs.

Respectfully submitted,

J. B. FORAKER,
Solicitor for Oberlin M. Carter.

December 17, 1909.

APPENDIX.

In the following opinions and findings of the Circuit Court and of the Circuit Court of Appeals, the paging is that of the official record from which these opinions and findings have been copied.

OPINION AND FINDINGS OF CIRCUIT COURT.

IN THE CIRCUIT COURT OF THE UNITED STATES

for the Northern District of Illinois,

Eastern Division.

United States
vs.
Oberlin M. Carter, *et al.* } Gen. No. 25,980.

Kohlsaat, J.

In this suit the government seeks to obtain from defendant, Oberlin M. Carter, possession and title to certain securities and real estate held by him, or in the name of the other defendants for him, which property, it is alleged, Carter purchased or caused to be purchased for him with moneys obtained by him or for him through fraud practiced by him upon the government in the letting and execution of certain contracts for the improvement of Savannah River, Savannah Harbor, Cumberland Sound, and several waterways in that vicinity. The amount in dispute somewhat exceeds four hundred thousand dollars ($400,000). The bill charges that Carter entered into a conspiracy with the Gaynors and Captain

Greene, contractors, or some of them to pay them or some one of them an exorbitant price for the work called for and then accepted from them, in discharge of the contract, constructions inferior in quality and quantity of material to such a degree that vast sums were realized by the contractors, in which sums Carter shared.

Two startling facts stand fully proved and practically admitted upon the record:

1st. The work was performed by Carter within the appropriation, in such a manner as to secure an increase in depth of the channel of Savannah River, two hundred forty feet in width at bottom, from Savannah to the ocean, of nine feet, whereby that city became the second city on the Atlantic coast in the volume of its commerce. This end had long been sought for without avail. The government engineers, almost with one accord, pronounce the work a triumph of engineering skill.

2nd. Proceeding from the contract in regard to these improvements, there is traced a mysterious fund of vast proportions, into the hands of some one, perhaps R. F. Westcott, father-in-law of Carter, a retired contractor of considerable wealth, now deceased, who was, in his lifetime, familiar with large transactions, from whom Carter claims to have received the properties in suit.

The transactions involve a number of construction contracts for improvements along the Atlantic coast in the vicinity of Savannah and Fernandina. An attempt to deal with each of these specifically would impose very considerable complications, as well as unnecessary prolixity, inasmuch as they all practically involve the same condition. Two of these contracts are, 1st, the contract of October 22, 1892, covering the expenditure of more than $3,000,000, upon the Savannah River and projects incident thereto, and, 2nd, the contract of October 8, 1896, for improvements in Cumberland Sound involving the sum of $2,000,000. It does not appear that any part of the property sought to be recovered herein was procured with moneys accruing to Greene & Gaynor out of this latter contract, but it serves to illustrate the methods employed in letting contracts and conducting the work under all of the contracts. These two contracts are typical of all the contracts. Besides the fact that the amounts involved are the largest, they disclose the general course followed in that class of work in that locality at that time by defendant, Carter; so that they may be dealt with as representing the course of procedure complained of. These two contracts will herein-

after, for brevity's sake, be termed the contracts of 1892 and 1896, respectively.

The record is unconscionably voluminous, covering about 50,000 pages; counsel on both sides have with great consideration and skill summarized it; so that the court is relieved of the burden of several years of reading.

Manifestly, the first attention of the court should be directed to the inquiry as to whether the evidence discloses fraud on Carter's part in disbursing the funds appropriated by Congress for these improvements. The finding of the court-martial was that he had committed that fraud. It must be borne in mind, however, that the evidence now before the court embraces not only that produced upon the court-martial proceedings, but a vast amount of additional evidence and that the finding of that tribunal cannot, of itself, be deemed conclusive herein, upon any material point. Moreover, it should be borne in mind that it was held by so great a legal authority as ex-Senator Edmunds of Vermont, in a reference made by the Secretary of War to him for the purpose of an opinion that the judgment of the court-martial was not sustained by the evidence adduced before it. The present suit involves directly, the title to property,—indirectly, to guilt or innocence of defendant, Carter. Neither party to the case can justly complain that the evidence has been in any respect unduly curtailed. The case has been submitted upon the merits, and without reliance upon technicalities. Greene & Gaynor were operating under their corporate name, The Atlantic Contracting Company of New York, which name will be used interchangeably with that of Greene & Gaynor.

The government's case rests largely upon circumstantial evidence. This may be summarized as follows, viz.:

(1) Defendant Carter was personally on friendly terms with Benjamin D. Greene, who was a retired army officer, and with John F. Gaynor.

(2) Carter had dealings of his own with Greene and the Gaynors, and at times contemplated joining them in extensive public contract work, outside of government work.

(3) As a step towards the alleged scheme to defraud the government, and share the booty with Greene & Gaynor, he caused notices to bidders under the specifications furnished by him for said two improvements of 1892 and 1896 to be published twenty-five days and twenty-two days, respectively, while the rules required thirty days, unless for good reasons a shorter time is specified.

(4) As a further step Carter's specification called for three kinds of mats, known as Nos. 1, 2 and 3, each differing very substantially from the others in form and price, and bidders were required to bid one price for them, giving to him the right to use whichever mat he might deem best, so that bidders were obliged, in self-protection, to base their bids upon the most expensive of the three, whereas, he privately advised Greene & Gaynor that he would practically use only the third, or cheapest mat, enabling them to use that mat as a basis of bidding, whereby they could and did under-bid the others.

(5) That he discouraged other bidders by unnecessarily withholding details necessary to intelligent bidding, and by exaggerating the expenses and difficulties of the work.

(6) That he accepted from Greene & Gaynor fascines used in mats, known as No. 3, made of leaves, pine tops, saw palmetto and other improper material, very loosely put together, in length much below the specifications, and placed end to end instead of being overlapped and built into each other, so as to break the joints, as required by specification.

(7) That he allowed these mats to be made into multiple mats averaging about eight single mats each, and placed in position in that form, thereby saving the cost of grillage poles and in other ways causing great saving to the contractor.

(8) That he paid for the mats by the square yard, as against the former method of buying by the cubic yard, and paid, therefor at prices three or four times higher than theretofore, and in quantities three or four times greater than those used in former contracts.

(9) That Greene & Gaynor realized a profit of several million dollars from said contracts, one-third of which mysteriously disappeared, while at about the same time there were deposited in the bank account of R. F. Westcott, from time to time, as payments were made on the contracts, amounts practically equalling the mysterious missing one-third, with which funds the property in dispute was purchased, and that Carter was a party to those transactions.

For defendants, it is insisted:

(1) That the notice was in the usual form and published the usual length of time, and approved by the Department.

(2) That the three different kinds of mats were of substantially the same value, and their inclusion in one bid not

uncommon, and that every bidder who inquired, was told which mat would be used, i. e., No. 3, and so understood.

(3) That every reasonable assistance and encouragement were given to those desiring to bid.

(4) That the fascines were made in substantial compliance with the specification, both as to material and construction, with, perhaps, a few exceptions, where they were overloked by reason of the great quantity used.

(5) That the mats were paid for in the way then prevailing, i. e., by the square yard, and that mats made about eighteen inches in height were more suitable for the character of work required in those improvements.

(6) That the use of multiple mats was permissible; that they were difficult to handle and much better adapted to the work; that the difference per mat in the amount and cost of material used as compared with single mats was negligible.

(7) That no more fascines were used than the work required; that the amount thereof used in canvassing for bids was stated to be more or less, and that an increase in amount would not have decreased the price if known.

(8) That it is not true that the price paid was appreciably in excess of former prices and that it was impractical to buy mats by the cubic yard.

(9) That the work, so far as completed, was a success and performed well within the appropriation.

(10) That if money was paid to Westcott by Greene & Gaynor, it was paid without either knowledge or suspicion of that fact on Carter's part, and that to the best of his ability, he honestly performed his duty in the premises.

Carter was placed in charge of the Savannah District in April, 1885, under Gen. Gillmore, and so continued until the latter's death in 1888. Afterwards, under Gen. Craighill, he continued in charge, until relieved in July, 1897, by Captain Gillette. His rétirement from the position was voluntary in order that he might accept positions elsewhere in the government service. Some time about the early part of 1884, he first met Greene, who was a retired army officer. In 1888 he considered the question of going into the contracting business with Greene & Gaynor in Chili. He writes in regard to certain pine lands to John F. Gaynor in 1885. Later (1886) his brother borrowed $1,600 from Greene, for which Carter went security. This was paid up. The record justifies the statement that Carter and Greene and John F. Gaynor were more or less intimate and had, at various times, talked of

entering into private business relations, while at the same time Greene & Gaynor were working upon government contracts under his direction, though there is nothing to show that at the time there was anything improper contemplated by either of them.

After the preparation of specifications for the said two improvements of 1892 and 1896, it was necessary that advertisements be made for bids thereon. The army regulations, based upon the Act of Congress calling for "sufficient public advertisement" in such cases, provided for a thirty-day publication and adds: "A shorter period may be named, if the necessities of the service render it desirable, but no period of less than ten days shall be designated, except in case of emergency." It is further provided that in cases of large purchases, thirty or more days' notice should be given. The proposed contract must be submitted to the War Department for approval. This course was pursued in the two cases under consideration, as well as in all the other cases. In a table showing the time of publication in seventeen contracts, ranging from 1890 to 1896, under Carter's direction, the notice in no instance exceeded twenty-seven days in the local papers and twenty-three days in the engineering journals. These were all approved by the War Department. General Craighill, retired chief of engineers, testifies that it was usual to advertise for less than thirty days. To the same effect is the testimony of Major F. A. Mahan, Corps of Engineers, Col. Marshall, formerly in charge of Chicago Harbor, says it depends on the circumstances of each case. If the character of the work is well known and contractors are familiar with its construction, the amount involved, he adds, in substance, would be of no moment. In such case, "I think I would advertise as short a time as I could in my judgment." Col. Willard, of the Engineer Corps, testifies that all large contractors know what is going on before the engineers do; that the length of time of advertisement is of no particular value to the contractors. Major Townsend testifies that he has varied the time of advertising all the way from ten to thirty days or even less. It appears from the record that contractors on national works keep track of the River and Harbor and sundry civil bills as they are passed, and study them with a view to becoming bidders, taking advantage of the data in the war office reports. A list of the periods of advertising done by Gen. Gillmore under twenty-one contracts shows no instance of thirty days, and quite a number of less than twenty days

—one as low as eight days. In the case of the 1892 contract, notice was inserted from July 27, 1892, calling for bids to be opened August 20, 1892. This was recalled by the Department and a new notice, setting out changes in the work was published August 21, 1892, for bids to be opened September 17, 1892. This is the notice complained of. Gen. Craighill says that in a similar case he would deem ten days sufficient. This course was approved by the Department. The record makes it very plain that Carter, in this respect, did not depart from the usual course obtaining in like cases. Indeed, Mr. Erwin, for the Government, concedes this and says:

"We do not contend that he has to advertise any of these contracts for 30 days by direct law, but what we charge is that he had discretion vested in him in fixing the time, and we say that in exercising that discretion, he did it deliberately and purposely in a way to cut off competition."

There is nothing inherent in the matter of notice which suggests any fraudulent intent. If there was any improper notice or means employed, it must be found outside the mere manner of giving the notice.

The specifications call for three different styles of mats to be employed in the work in such quantities, respectively, as the engineer in charge might deem desirable. Mat No. 1 was composed of logs laid parallel to each other and then fastened together in that position and covered with several inches of brush, the whole bound together by poles to the required dimensions. No. 2 consisted in artificial logs, made of brush bundles, called fascines, laid in alignment, tightly bound or choked at regular intervals, and placed side by side as in No. 1. Across these were placed, transversely, long brush logs, one on each edge, and one down the middle. The whole were then firmly bound together by grillage poles. No. 3 consisted of brush logs, firmly united by grillage poles as in No. 2, but lacking the transverse brush logs. Double sets of grillage poles were provided for.

It is contended by complainant that these three mats differed very materially in cost per square yard to the contractor, and that by reason of inside information to the effect that only the No. 3 mat would be insisted on, the Atlantic Contracting Company was able to underbid other contractors. Carter's method in this respect was approved by the Chief of Engineers, if not required by him. Practically only No. 3 mattresses were used. Captain Gillette, who succeeded Carter, and became the chief factor in Carter's prosecution, tes-

tified that mat No. 2 had ten per cent. more brush in it than mat No. 3 and that it would cost at least twenty-five per cent. more than mat No. 1. W. H. Venable, a contractor, says he would have bid had the bids for the mats been received separately. Major Black, of the Engineer Corps, for complainant testifies that he did not consider it right to require one price bid for all three designs, but states that mats two and three were of substantially the same value and both worth more than design one, based on prices paid at St. Augustine and St. Johns Harbor, Florida. Major Gaillard, Corps of Engineers, testified that the cost of mats two and three would be practically the same. Major F. V. Abbott testifies that he called for separate bids on somewhat similar mats at Winyaw Bay and received about the same bid for each design. J. W. Rutherford, contractor, states that the difference in cost of the three designs was a very small matter in the totality of the contract and that they were practically of the same cost. He as a bidder did not consider the difference in cost as of any importance. C. P. E. Burgwyn, a civil engineer and contractor, and P. Sanford Ross, a contractor, both competitors of Greene & Gaynor, say they did not think the difference in cost was at all embarrassing in making out their bids. To the same effect is the testimony of A. R. Stewart, a contractor, James A. Bryan, also a contractor, E. L. Friday, a contractor, and Roderick G. Ross, a contractor, all prominent in their lines and competitors of Greene & Gaynor. The latter says designs two and three cost something more than design one. Complainant undertakes to minimize the weight of the testimony of these witnesses by showing inexperience with regard to mats and friendly relations on their part with Greene & Gaynor. Making due allowance for both of these, I am clearly of the opinion that the evidence shows there was nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same when considered with reference to the fact that different kinds of work might require different designs, on the same contract. Of itself, it discloses no evidence of a conspiracy to defraud, nor does it tend so to do. Complainant alleges that while Carter embarrassed other bidders by including the three designs as of one price, he advised Greene & Gaynor that he would use the third so that they were able to underbid the other bidders. There is no direct evidence in the record to sustain this charge. It does

appear, however, that a number of those intending to bid, i. e., C. C. Ely, agent for P. Sanford Ross, W. F. McCauley and L. Y. Schermerhorn were advised that design 3 would be mainly used. Contractors J. W. Rutherford, A. R. Stewart, J. L. Grimm and R. G. Ross also knew that fact. There seems to be little ground for complainant's conte. .on in that behalf. There is some attempt in the record as against Carter's denial, to show that Carter discouraged would-be bidders by: 1, Refusing to furnish specifications to persons representing undisclosed principals; 2, Sending only one copy to known bidders, notwithstanding the time was short, whereas he knew it required three copies to enable one to prepare a bid, and then advising them that should they conclude to bid, he would on application, send the other two copies, with the request to return the copy sent, if there was no intent to bid, thus advising Carter in advance who was going to bid, where information, it is claimed, was in turn communicated to Greene & Gaynor; (3), Sending wrong paper when time was short, or knowingly sending copy to wrong address; (4), Exaggerating the difficulties and expense of doing the work.

When it applied for specifications prepared for the 1892 contract, on August 26, 1892, in which the opening of bids was to occur on September 17, 1892, a period of twenty-two days afterward, the American Dredging Company, by L. Y. Schermerhorn, its president, received in a letter dated August 29, only one copy, accompanied by the request that it consider the same carefully "and if you decide to bid upon the work, I shall take pleasure in showing you over the same and giving you all the available information concerning it and furnishing you with the two remaining copies of the specifications necessary to enable you to submit your bid. If you do not intend to bid, please return the enclosed specifications." On September 7, the company wrote for the other two copies, which were sent September 7, with the information that a bond for $500,000 would be required on the dredging contract. Schermerhorn testifies he went to Savannah, got all the information he wanted, freely, and put in his bid. The same method had theretofore been pursued by engineers formerly in charge of improvements in that vicinity, i. e., Captains Post and Bailey. Major Mahan, Col. Willard, Major Townsend, George Y. Wisner, civil engineer, P. S. Ross, contractor, L. Y. Schermerhorn, above referred to as having received only one copy at first, and J. R. Gilmore, chief clerk for twenty

years of Gen. Gillmore, all state that as a usual thing only one copy was sent at first and on application afterwards, the other two were furnished. The latter witness says that many applications were received from parties who didn't care to bid when they had seen the character of the work. One witness, James Foley, sent for specifications on a bet that he could get them, and did receive them from Carter, when he had no intention of bidding. Carter seems to have made several mistakes, such as enclosing the wrong paper to the National Dredging Company, and addressing San Francisco Bridge Company at San Francisco instead of New York. It is difficult to see how any sinister motive can attach to these two very common mistakes. I give them no weight. As above stated, it is in evidence that parties likely to compete for harbor improvement and other government work, began preparing for their bids, as soon as the appropriation bills were passed. It further appears that the character of the work in these two improvements was such as to require the services of parties skilled in waterway construction; so that persons entering upon such contracts advisedly were not limited to information gathered from the specifications alone, though, of course, before bidding intelligently copies were necessary. It is urged that Carter, on several occasions, took pains to impress bidders with the difficulties of the work. Venable, whose ability to meet the requirements of the 1896 contract was unknown, says Carter told him it would require an equipment for the two contracts of at least $400,000, and asked him the extent of his preparation for the undertaking, and told him a tramway would have to be built over the breakers, costing many thousand dollars; that the water in the Sound was very rough; whereas, Greene & Gaynor's equipment, it is claimed, turned out to amount to only $27,000, and no tramway was constructed by them. This is denied by Carter. If Venable had possessed information, however, and judgment sufficient to enable him to make an intelligent bid in those constructions, he would not have had to rely upon Carter's judgment. The facts seem to be that he was inexperienced in that line and desired to enter into the competition for the purpose of selling stone to the successful bidder. Before the bids were opened he had made an arrangement, he says, with John F. Gaynor to supply the stone necessary for the work and had withdrawn from the contest. Afterwards, by reason of the use of brush fascines almost exclusively, his deal proved to be barren of results, and he became em-

bittered. Whether he was imposed upon is not here material. He is corroborated by F. A. D. Hancock, who expected to work with him on the contract. It appears that there were about fifteen bidders present at the opening of the bids on the 1892 contract. There were three bidders under the 1896 contract. As is not at all uncommon, there appears to have been an attempt on the part of the bidders to stifle competition. Whether Carter knew of this is not shown. Certainly, there is nothing in the record with regard to the opening and letting of the bids in and of itself calculated to cast suspicion upon Carter's conduct.

The contract of 1892 for the improvement of the Savannah River as well as the other contracts complained of, called for bids for mats, by the square yard. These contracts were all submitted to and improved by the Chief of Engineers' office, and the Department, upon suggestion of the engineer in charge, whose recommendations in such matters, the Government claims, are generally followed. Until Carter pursued this method, it is asserted, mats had always been purchased by the cubic yard. This does not seem to be justified by the evidence. Mats had been paid for by the square yard by Col. Black in 1888 and 1890, Col. Bixby, 1889 and 1890, Capt. Carter, 1891, and Col. Stanton, 1892. Whenever mats to any considerable amount were required, they were purchased by the square yard. By paying therefor, at ninety-five cents per square yard of prepared mats the Government insists that the cost of construction almost quadrupled that of work of the same nature and locality carried on by the Government prior to 1891.

The fascines were choked, i. e., tied, at each end and oftener if necessary to a diameter of nine inches, leaving the intermediate portion of the fascine "bulged out." These laid in mat form, including grillage poles, it appears gave a body 18 inches in height. The price paid covered the above 18 inch structure. In several small prior contracts, the fascines were procured by the cubic yard, and the contractor was then required to make into mats whatever was necessary, without any charge therefor. Very little material was so put together. Col. Bixby, of the Corps of Engineers, claims for himself and Major Black the credit of first using mats by the square yard, back in 1889 and 1890. The same method of measurement was employed by Major Stanton in about 1892. Carter had previously, in one or two instances, paid for these brush mats by the square yard. There seems to be no reason

why this class of work should not have been dealt with by the square yard. The only manner in which fraud would in such case be accomplished, must be in the price paid, or in the character of work accepted, or both.

Substantially all of the fascines used in the several improvements under consideration were made up into mats. These fascines are required by the specifications to "be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge. The fascines will be from twelve (12) to one hundred (100) feet in length (contract of 1892, and 30 to 100 feet in contract of 1896) and must be compressed tightly by an approved form of choker to a diameter of nine inches at intervals of two (2) feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush used shall be as straight and well trimmed as can be obtained, the fascines shall be carefully and thoroughly made and handled with care. They shall be piled on shore or on barges for measurement in such way as the Engineer officer in charge may direct."

For the purposes of canvassing bids the specifications of the 1892 contract assumed the quantities of different materials to be used as follows, viz.:

Square yards of mattresses	350,000
Cubic yards of fascines	300,000
Sawn timber (feet)	800,000
Riprap stone, cubic yards	200,000

Under the power reserved in the contract authorizing the engineer to vary the relative amount of each, Carter increased the amount of mattresses to 1,363,572 square yards, to the practical exclusion of the other materials above enumerated. He was thus able to keep within the estimate of cost of the whole and within the appropriation, while at the same time he accomplished the results sought for. Conceding the power of the engineer in charge to make such a radical change, some of the expert witnesses were of the opinion that the proposed change should have been submitted to the war office for approval in view of its radical nature. For defendant it is insisted that the frequent reports, showing the progress of the work, advised the Department of what was being done, which was all that was required. It is not denied that the substitution appears fully in these reports. In and of itself, no improper motive can be deduced on Carter's part, from his course in this respect. The failure of the De-

partment to call attention to the change might be fairly assumed to indicate approval.

The specifications provide that the third design mattress, i. e., the one actually used,

"will consist of a bottom grillage of poles of live saplings, of pine or other timber of a kind approved by the engineer officer in charge. The poles must be straight, of slight taper, of an average diameter of from four (4) to five (5) inches, and not less than three (3) inches at the small end, and must be placed from four (4) to eight (8) feet apart between centers, both longitudinally and transversely, and spliced together with long scarf joints in a manner satisfactory to the engineer officer in charge. Upon the grillage will be placed a layer of closely compacted fascines, surmounted by a top grillage similar in design to the one at the bottom. The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such manner as the engineer officer in charge may approve."

It is further provided therein that,

"The size of the mattresses will be fixed by the engineer officer in charge from time to time. In general they will be from twenty (20) to one hundred (100) feet in width, have such lengths as may be convenient for handling, &c."

It is also provided therein that,

"As a general rule all materials will be measured by the engineer officer in charge, or his representative, after their arrival upon the ground and just before being placed in the work. The mattresses may also be inspected as made."

Greene & Gaynors' bid for mattresses per square yard was, as above stated, ninety-five cents; for fascines per cubic yard, $1.60. It is the contention of the Government that the fascines should have been procured and measured by the cubic yard, and, when required, made into mats without additional cost, as was done on several former jobs, where it appears the amount of mattresses required was nominal. The evidence shows that while small quantities of brush fascines can be readily obtained in almost any locality, large quantities are hard to get. It may well be that in volume such as was used in the 1892 contract, a very considerable area would be devastated. The evidence shows this to have been the case. It is shown by the evidence that the construction of fascines into mattresses is a matter of very considerable expense. Col. Bixby of the Corps of Engineers testifies that,

"Buying brush alone,—buying fascines alone, why they would be stacked up ordinarily, stacked up and measured in the same way you would measure cord wood—stacked up and measured by the cubic foot or cubic yard, but when they were made into the mattresses, there was so much work connected with building them into the mattresses, that the only feasible way I saw at the time was to pay for them by the square yard, which was the reason that I put it into those specifications."

It is not charged in the bill that $1.60 per cubic yard for fascines was unreasonable. Carter testifies that it would require about nine of the fascines made from the scragly brush found on the coast and choked to nine inches and one yard long to make a cubic yard; that the same fascines put into the form of a brush mattress would compress so that four to the square yard would be required and that when subjected to the pressure and weight of an eight course multiple mattress, it would take six fascines to make a square yard, as against nine in a cubic yard, or perhaps ten. Each square yard, he testifies, would thus require 6/10 of a cubic yard of fascines or ninety-six cents. Adding to this the cost of grillage, estimated by Carter on data furnished, as he claims, by Major Black and Captain Gillette, to amount to twenty-three cents, the cost of one square yard of fascine in multiple mat form, amounts to the sum of $1.19. In September, 1893, the contractors on the 1892 contract began to construct what are termed multiple mats or mattresses. The contract does not make provision for these specifically. They consist of one mattress imposed upon another, varying from two to as many as sixteen, according to the needs of the construction. They were built upon the deck of a barge especially prepared for the purpose, with facilities for sliding them from the deck into the positions desired. It is claimed by Carter and seems to be conceded that this method of planting the brush mats was found to be very desirable in order to prevent the undermining which preceded the laying of single mattresses or stone work. The scouring produced by the resistance of the single stone-loaded mats to the currents had a tendency to cause the currents to work around the outward end of the single mat and stone work and undermine it. By the use of the multiple mats, the construction proceeded so rapidly, and so affected the currents as to prevent the bottom wash, whereby a more even foundtion and other good results were obtained. In addition, it seems, the single mats when separately

loaded with stone for ballast, were apt to sink into the soft bottom of the river—sometimes to a depth of seventy feet. By the use of multiple mats, it was possible to sink eight courses of mattresses with the same amount of stone as is required by the specification in sinking one mattress. Thus seven courses of stone were saved, while at the same time the construction was laid rapidly and made less liable to sink into the muddy and sandy bottom of the river. To build these multiple mattresses without making the openings between the different layers, too large, the double grillage was omitted from all the mattresses, excepting the lower side of the lower mattress and the top of the uppermost mattress. There would be only a half grillage between the intermediate tiers of fascines. The multiple mat was firmly bound together with wire and by other prescribed methods, so that the whole formed a compact body of large dimensions, often one hundred and more feet wide, and fifty feet long, weighing sometimes two hundred tons. The barge was then towed out to the place where the mat was to be placed, and, by means of a lowering adjustment located on the side of the barge next to the destined place, the mat was slid off into the water and into position, and weighted with stone sufficient to sink it and hold it in place. Complainant insists that thus a large saving was made to the contractors both in material and labor, in that they were saved the trouble of planting each mattress separately and the cost of the unused grillage poles. The saving in stone accrued to the government, except so far as it was otherwise expended, more particularly in paying for the extra fascine work. The use of multiplte mats on the Savannah river work is warmly approved by most of the experts and is fully justified by the evidence. It is also clear that for the purposes of that work, it was desirable that the grillages be made single except at the bottom and on the top of the multiple mattresses. Carter testifies that he caused the contractors to increase the amount of fascines to make an equivalent of the omitted grillage poles. Col. Bixby was of the opinion that the contractors gained little or nothing by the use of multiple mats, and that the government was getting its work done at less expense. A number of witnesses testify that it was just as expensive to the contractor to handle and sink these heavy multiple mats as to sink them separately. It should be borne in mind that Greene & Gaynor would have made a very large profit on the omitted stone had it been used—as much as $275,000, it is estimated by

complainant's witnesses. Col. Handbury, Corps of Engineers, was of the opinion that Carter's change to multiple mats was within the specifications. Major Mahan, Col. Marshall, Col. Willard, Col. Rossell, Major Townsend, and Major Rees all assert the same. Some of them state that it was the duty of the engineer to resort to multiple mats under the terms of the contract, whenever that method became desirable. To the same effect is the testimony of a number of contractors. A number of bidders testify that they were advised that multiple mats might be used. It seems clear from the evidence that the introduction of multiple mats into the work on the Savannah harbor was judicious and essential. From the complainant's witness Cooper it appears that the eight course multiple mats stood twelve feet high when measured, just before they were put into position—or an average of one and one-half feet each. This was without the full grillage. In order to account for this height of the construction after eliminating one-half, at least of the grillage poles, it must be assumed that the reduction in height by reason of the omitted grillage poles, estimated by complainant to be equal to one course in each eight course mat of the third design, was compensated for by the addition of some element of the mat—presumably more fascines, as stated by Carter, Wisner, Schermerhorn, Burgwyn, and the employees of the contractor. Bulk for bulk, it appears that fascines were quite as valuable as grillage. Considering, therefore, this fact, and the further facts that there were considerable time and outlay involved in constructing the multiplte mats, as well as great difficulty in handling them, especially in rough water; that some of the mats had to be transported many miles; that the mats measured up so well notwithstanding the pressure of the great weight imposed upon them, and the successful outcome of the construction, there seems to be little ground for questioning the good judgment and skill of the engineer in charge, in causing the mats to be put together and used in multiple form. Nor is it apparent that there was anything suspicious in his not insisting on a reduction in price per square yard, for mats laid in multiple form as against individual mats, provided they came up to the specifications.

At the time the investigation under Gillette began, the work under the 1892 contract in Savannah Harbor had been completed, and the Cumberland Sound 1896 contract was under way. As a consequence, it is not easy to ascertain just what was the construction of the mattresses, multiple and

single under the 1892 contract. It seems to be conceded, however, that, except for the fact that they contained something more of grillage, they were substantially the same as those of 1896 Cumberland Sound contract. There are several respects in which complainant insists the fascines failed to comply with the contract:

(1) They were accepted in lengths varying from 12′ to 18′ instead of 12′ to 100′, as required under the 1892 contract and 30′ by 100′ as required in the 1896 contract, according to Carter to facilitate hauling from camp to barge, saving to contractor 25% of cost.

(2) They were not well trimmed;

(3) They did not contain the quantity and quality of material required;

(4) They were not arranged and tied according to the specifications.

The specifications of the 1892 contract call for fascines from 12 to 100 feet in length: Those in the 1896 contract were required to be from 30 to 100 feet in length. In the mattress known as design No. 2, it is provided that the brush should be "carefully laid in the fascines, so as to break joints and to make a continuous fascine extending completely across the mattress." The clause is not repeated or referred to in the description of design No. 3, used by Carter in this work. For the Government, it is contended that it should be read into design No. 3. There does not appear in the evidence, any inherent reason why it should be required in the one and not in the other. Fascines 100 feet long could with difficulty be transported from the camp to the barge. Carter seems to have followed the wording of the 3rd design specifications in that respect. No continuous fascines were insisted on. His excuse is that he thereby hastened the work without injury to the government. Indeed it does not appear that continuous fascines added anything to the merits of the mats. On the other hand, it is claimed and with reason that the use of short fascines resulted in a saving of labor and trouble to the contractor. Under the circumstances, it cannot, however, be said to have been a departure from the contract such as would have enabled the engineer to require of the contractor a reduction in the price bid. It would seem that the use of the term "12 to 100 feet in length" should be construed as disclosing an intention to afford the engineer all the latitude reasonably to be required in the changing conditions of the work, between those extremes. That latitude might easily

be abused, but it is not per se evidence of a misuse of it, to waive the more expensive construction when no disadvantage would thereby accrue to the work in hand. Considerable discussion has arisen in the course of the hearing as to the fair construction to be placed upon the language:

"The brush used shall be as straight and well trimmed as can be obtained."

This sentence should be construed in connection with the first clause of the section of the contract in which it occurs, viz.:

"All fascines will be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge."

The coast brush from which it was contemplated these fascines were to be made is shown by the evidence to be gnarly and otherwise difficult to reduce to symmetrical bundles. Ordinary military fascines, so-called, consisted of trimmed rods or poles so bound together as to constitute a compact bundle. There was no attempt on Carter's part, either in the specifications or practice, to require this class of fascines.

Complainant insists that Carter construed the same specifications to mean practically military fascines on the work let to Albert J. Twiggs July 5, 1893, for an improvement in Savannah River near Augusta, when he had permitted Walsh & Gaynor theretofore to use mere brush fascines in the same locality and that such discrimination worked great injury to him, Twiggs, and contributed to his failure on the job. Conant, the civil engineer in charge under the Twiggs construction, says he was told by Carter to apply a different rule to Greene & Gaynor's work on the coast under the 1892 contract (which he also had charge of) from that imposed upon Twiggs. He says the material growing near to and employed in making fascines in the vicinity of Augusta was small, clear and straight and required very little trimming. The fascines were used in constructing a spur-dam and in short protection. He was told by Carter that the up-river work required more wood and less fine material than that in the harbor, where it was designed to catch silt. He contradicts Twiggs' assertion that he, Twiggs, was in any way discriminated against. In this he is corroborated by Ford and Rees, inspectors upon this work. Twiggs had intended to be a bidder on a former contract, but took five hundred dollars and a promise from Gaynor, he says, that he should have the stone

work, and withdrew from the bidding. Afterwards, by reason of the substitution of fascines for stone, he got no benefit out of the stone work, and became embittered. He seems to have lacked both the capacity and the financial ability to handle a large contract. He claims that he refused an offer of $1,000 by Gaynor to withdraw from the list of bidders under the Augusta River improvement contract, which was awarded to him, and which, by reason of Carter's strict construction of the specifications, he was unable to complete. As above stated, Carter, Conant, Ford & Rees deny all oppression on Carter's part. General Craighill, Carter's superior officer, testified that the term "well trimmed" did not mean trimmed of all limbs, but suitably trimmed for the purposes for which it was to be used; that some places require one kind of fascines and some another kind; that where it was desirable to gather the silt, twigs, small limbs and even leaves should be left on.

"If it is to be a brush fascine, intended to be used as a part of a brush mattress," says Gen. Ludlow, "then the more leaves and twigs you have on, the better as long as it does not interfere with the choking. Well trimmed doesn't mean bare poles."

Col Rossell says,

"To interpret the term 'well trimmed' it would be necessary to know for what purpose the fascine was to be used. It would have a different meanings in different cases."

Col. Marshall, Major Mahan, Col. Willard and Col. Handbury, testify that the term "well trimmed" includes fascines made of brush, limbs and twigs. Altogether, Major Townsend says, he would not consider it good engineering to remove the brush, twigs, and leaves on the Savannah Harbor work. This construction was placed upon the term on river improvement work at Rock Island. Major Rees says the term was always construed in the Savannah District by government employees to mean brush so trimmed that it would lie close and be bound into cylindrical shape with all the twigs, leaves and small brush retained. All of the foregoing nine officers were at the time their depositions were taken prominent in the Corps of Engineers of the United States. In corroboration of their testimony is that of J. H. Westerfield, civil engineer, who had charge of certain brush work on Savannah Harbor, under General Gilmore before Carter was assigned to that district, Schermerhorn, a civil engineer and competitor of Greene & Gaynor, L. E. Cooley, civil engineer, and E. A. Gieseler, as-

sistant engineer in local charge of the Savannah office, Cooper, one of complainant's principal witnesses, says:

"I consider the loose brush mat preferable to the military fascine for filling in."

Considering the character of the witnesses, whose testimony is referred to above, and their positive assertions, there is nothing in the record deemed sufficient to sustain the contention of the complainant that the specifications of the 1892 contract should be construed to mean military fascines, or bundles of rods or bare poles.

Whether in view of this holding, the fascines of the 1892 contract were well trimmed, will appear from a consideration of the quantity, arrangement, quality and binding of the materials used in the fascines. As above stated, there is not a great deal of evidence in the record as to the construction of the fascines used in the Savannah Harbor work under the 1892 contract. Assuming, however, that it was substantially the same as that supplied under the Cumberland Sound and Tybee Roads 1896 contracts, there yet remains in the great prolixity of the evidence on the subject, considerable uncertainty as to their makeup. It seems the bundles were built in as many different camps according to the supply of brush, and the testimony of the witnesses varies according to the different conditions obtaining at the several brush cutting places, as well as in the mental attitude of the various witnesses toward the defendant, Carter.

According to the testimony of Captain Gillette, who was Carter's successor and the prosecuting witness in the court-martial proceeding, and that of Arthur S. Cooper, civil engineer under Carter and Gillette on the works under consideration, Albert J. Twiggs, who accused Carter of unfair discrimination against him with reference to his Savannah River contract, Ernest B. Parker, carpenter and laborer generally, employed by Greene & Gaynor in charge of their mule lot, and later on a barge, Phillip Hopper, who cut brush for Greene & Gaynor from his father's land and the government reservation for two weeks and himself made bundles at four cents each, Frank DuBois, who cut brush and made bundles for the cost of the work from his own land, and O. C. Darling, from whose land brush was cut for the Cumberland Sound work, the mats then used were of very inferior construction, being filled up with all kinds of scrub growths, crooked limbs, straw, leaves and the like. Gillette's observation begins at a period some time subsequent to Carter's withdrawal and

has reference to only two or three mats. It is not contended that these objections applied to all the work. In the mats seen by Gillette, he says he could with difficulty discover any bundles or other bindings. The grillage poles were smaller than those called for in the specifications and much fewer in number. The mats were only eight feet high—one four foot bulk of brush imposed upon another of same height in such a manner as to form steps—the top one being 50 by 80 feet in area, and the lower one 50 by 100 feet. He estimates this construction cost the government $3,600, and that this price was grossly excessive; that the whole was very loosely put together with lath yarn, so that it spread out and looked like a rough bundle of tangled brush, not sufficiently solid to bear up the weight of a man attempting to walk over it. There is discernible some more zeal on Gillette's part than comports with an impartial investigation of his predecessor's transactions, which seems to have also had its effect upon those who were his subordinates at the time of taking their evidence. How far this has colored their testimony it is not easy now to determine. Were their evidence to obtain, the court must of necessity find that the defendant was faithless to his trust. On the other hand E. R. Conant, a civil engineer in charge of part of the work on Cumberland Sound says that work had to be done with scraggy material from near the coast, and in that respect differed from the work near Augusta, Georgia, with which witness Twiggs compares it. General Craighill, former Chief of the Corps of Engineers, and who was Division Engineer for the Savannah District for a number of years, now retired, says he saw the mattresses used in Savannah River in March, 1893, and later from his own boat and on Cumberland Sound, and deemed them well adapted to the harbor work. He asserts that brush and leaves were more serviceable at catching and holding sediment than military fascines, i. e., those which are trimmed and consist of bundles of small stems or poles. He deemed Carter's work in Savannah River and Cumberland Sound most successful, judged by their results. Captain Gillette's successor, Colonel Quinn found Carter's work in Savannah Harbor in excellent condition as late as 1903. Colonel Bixby says the contractors used more material at Savannah and Cumberland Sound than was required of them by their contract. Colonels Rossell and Mahan say that the so-called military fascines would not have been permissible in the harbor work. Major Townsend says he was accustomed to construe the terms of the contract just

as Carter did; that he had used more than a million yards of brush mattress with the same specifications and had accepted material almost identical with that accepted by Carter in the big Savannah River contract, and that it was a wise move on Carter's part not to advertise for multiple mats because Gaynor owned a patent for such work. Major Rees and General Craighill find no fault with Carter's construction of the contract. Lyman E. Cooley, Wisner, Burgwyn, Schermerhorn, Blandford, Rutherford, Burnett, Brown, Ensey and Ford, all eminent civil engineers, testify that the work was done according to contract. Gieseler, an engineer in Gillette's employ, testified to the value of Carter's work, and was dropped from government employ shortly after so doing by Gillette. Bryan, a contractor. says the work was well done. Ely, a contractor, says Gillette threatened to injure his character, if he would not testify against Carter. The foregoing witnesses were either government engineers, or prominent civil engineers or contractors in competition with Greene & Gaynor, all of them men of standing and eminent in their line. As might be expected, they are not all advised in detail as to the work in question. They were, however, posted generally in regard to the construction and methods complained of, and are entitled to great consideration. It is an impressive fact in this case, that the defendant is so emphatically endorsed by these men who are above suspicion.

There are also some ad hominem considerations which may serve as makeweights in arriving at a just estimate of Carter's conduct. He withdrew from the charge of the work for the purpose of accepting a position of honor as military attache at the court of of St. James and Army Engineer of the Nicaragua Canal Commission. There is nothing to indicate that he was forced to do so. Is it likely that he would have left matters in such shape as to put himself and his honor into the hands of his successor? And again, if he were conniving at personal profit, would he have naturally retired from the service in the face of the opportunity just at hand to reap large additional profits from the Cumberland Sound contract?

It is a difficult thing to arrive at a satisfactory conclusion of any construction after it is finished. To find fault with a great public work is not difficult—especially where the investigation is one-sided. The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed carelessness for

which Carter was justly entitled to be criticized, but considering the material results, the magnitude of the work, and assuming the absence of any mercenary or other ulterior motive on Carter's part, except such as might be justly deduced from the facts so far considered, I am of the opinion, as was Senator Edmunds in the court-martial case, that Carter's course in the premises was not necessarily an abuse of the discretion vested in him, nor seriously inconsistent with his claim that he discharged his duty to the government, and that, limited as above stated, under the rule of evidence obtaining in such case, the government has failed to maintain its case.

It is, however, the contention of counsel for the government that the foregoing facts should be considered in their relation to the evidence introduced herein to support the charge that the moneys with which the securities and other property in suit were purchased were paid to Carter or to R. F. Westcott, his father-in-law for him, with his knowledge and connivance, by the contractors, as his proportion of the moneys by him fraudulently allowed to the contractors, as it is claimed, on said contracts, in excess of a fair and reasonable consideration for the work actually done by them under the several contracts in question. This evidence, in its present state, was not before Judge Edmunds when he reviewed the finding of the court-martial. It has been procured by the government attorney and expert through very great ingenuity and patience, with the result that counsel for Carter are forced to admit, or at least not to seriously controvert the fact, that large sums of money, in many instances corresponding in date and relative amount to the sums paid Greene & Gaynor from time to time upon their contracts, by Carter for the government, found their way into Westcott's bank accounts. In order to show a systematic course in the payment to Westcott of approximately one-third of the profits accruing to Greene & Gaynor upon said contract work after 1892 as they were received by them, the government's expert witness has in a number of instances forced balances and drawn strained conclusions, which might in a less conclusive showing, throw suspicion upon all his evidence on the subject, but the coincidences tending to identify moneys paid to the contractors with those in Westcott's bank accounts are, in the mind of the court, so conclusive, that the fact of such payments are beyond doubt as to a large number of the items. For Carter, it is asserted as above stated, that, if

Westcott had any interest in the several contracts in suit, Carter was never advised thereof, and never suspected it; that Westcott held him in tender regard as the surviving husband of his deceased daughter and lavished upon him large sums of money from his great wealth, and promised to make him his heir in place of his deceased daughter, Carter's late wife, and that, admitting the receipt by Westcott of large sums of money from Greene & Gaynor, a considerable part of the property in suit was not purchased with moneys derived from that source, or with any moneys which arose from any government contract; that when the securities were turned over to him by Westcott, he supposed Westcott was carrying out his promise to make him his beneficiary. There is no legal presumption here, that Carter knew what was going on and had been a party to it. The circumstances considered, however, he could hardly fail to charge himself, as he undertakes to do, with the task of explaining very many items shown in the accounts in evidence. It must be borne in mind that the transactions in suit covered the period from December, 1891, to 1897, during which period a number of contracts were let, and that even though Carter was not in actual conspiracy with the contractors, yet if he knew of their vast profits on the prices allowed them on the earlier work, it was his duty to investigate thoroughly the situation and see to it that the government thereafter paid no more than was fair and just. Even negligence under such circumstances would have amounted to fraud. If, therefore, Carter was cognizant of the fact that the contractors were reaping an abnormal profit from the 1892 work, and that Westcott was interested in that profit and was turning it over to him under any kind of a cover as and for his share of said profit, he was false to his trust, and should be held liable to make good to the government all the fruits of his fraudulent acts. This, of course, pre-supposes that such profits, if any, grew out of fraud upon the government in the matters of letting or executing the contracts in question, or both. If the government lost nothing by the transactions, there is nothing due it.

The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst. No doubt some shameful part of the profit reaped from these harbor constructions came in this

way. How much can never be ascertained. Certainly not all of it, nor even, relatively speaking, a considerable portion thereof. It is also claimed that some of the saving to the contractors arose from the fact that they or some of them claimed a patent or patents upon the methods for handling multiple mats. The record discloses no basis upon which to estimate that saving, if indeed, it resulted in any saving, so that it is without moment at this time. Undoubtedly, constructions of the character now involved, afford, when held down to a fair advance on actual cost, little or no inducement to contractors, because of the element of chance growing out of the weather and water conditions. Liberal allowance should, under the evidence, be made to cover such contingencies. But when all these considerations are borne in mind and given due weight, it is still beyond controversy from the record, that a great wrong was practiced upon the government by the contractors.

The evidence to be found in the record with regard to the financial transactions of Carter, Westcott, and the contractors, Greene & Gaynor, is both vast and intricate and entirely circumstantial. It has been read and re-read by the court, as presented in the briefs and depositions. To recite it here is of no value. Suffice it to say that without passing directly upon the questions as to whether Carter had actual knowledge of, and connived at, this raid upon the government, the facts brought out concerning these financial transactions are such that he must, as a conclusion of law be held chargeable with knowledge of what was being done in the premises. This fact alone makes it clear that the government is entitled to a decree awarding to it each and every of said pieces of property held by the receiver, which shall be found to have been purchased, directly or indirectly with moneys received by Westcott or anyone else or in any other way arising from funds made up of profits realized by the contractors under the contracts in suit. And it will be so ordered. In view of the prolixity of the evidence upon the subject of the moneys with which these securities and property were purchased, the court will not at this time dispose of that question, but leaves the matter temporarily with the respective counsel, to agree, if possible, upon a list of those securities and properties as to which, in view of the above finding, there is no contest, and also to come to a settlement of the whole matter, should

they be able to do so. To that end the further consideration of the cause is continued for thirty days.

Endorsement: Filed April 14, 1908, nunc pro tunc as of Jan. 9, 1908. H. S. Stoddard, Clerk.

OPINION AND FINDINGS OF CIRCUIT COURT OF APPEALS.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 1534 and 1535.

October Term, A. D. 1908.

The United States of America, *Appellant*, *v.* Oberlin M. Carter, Lorenzo D. Carter, I. Stanton Carter, Horace G. Stone, Nathaniel C. Sears, The International Audit Company, Robert Nelson and Lyman E. Cooley.	Appeal and Cross-Appeal from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

Before Grosscup, Baker and Seaman, Circuit Judges:

The appellant, United States, is complainant in a bill filed in the trial court against Oberlin M. Carter, as principal defendant—with Lorenzo D. Carter, I. Stanton Carter and another impleaded as defendants for subsidiary relief—charging (in effect): fraudulent conduct and conspiracy with persons named as contractors, on the part of Oberlin M. Carter, while serving as engineer officer of the army in local charge of harbor improvements and disbursements therefor, in the Savannah district of Georgia, whereby the United States was defrauded in the letting of contracts and payments from the public funds of exorbitant rates and amounts, aggregating two million dollars in excess of the fair value of work performed; that the illicit proceeds and profits of such transactions were divided between the contractors and such defendant, or for his benefit; that such shares therein of the defendant were largely invested by him or for his benefit in real estate and

securities, which came to his possession; that portions thereof have been traced and are impounded in other courts under like bills, and other portions are believed to be secreted; and that the other defendants named are secreting and holding in trust for him portions of such investments. This bill was filed as ancillary to other bills therein referred to, but was ultimately adopted under stipulation, as the primary case for trial. Upon final hearing of the issues joined (after various proceedings impounding property in controversy as proceeds of the alleged transactions), the decree of the trial court was entered in two parts—one entered March 21, and the other April 14, 1908—and the United States appeals from both decrees.

The main decree is that of March 21, which adjudges in substance: (a) That all moneys arising from profits made by the contractors, "described in the bill and auxiliary bills," constitute a trust fund in favor of the United States, together with the investments and income thereof, and belong to the United States, and not to the defendant Oberlin M. Carter; (b) that certain securities impounded in the hands of receivers were not purchased with such trust fund, and belong to such defendant; (c) that the other securities and property described "are traced from and held to be investments" arising from such trust fund (aggregating "at cost or proceeds" $367,822.71), and adjudged to be the property of the United States; (d) that deficiency decree against L. D. Carter is denied; (e) that deficiency decree is denied against O. M. Carter for proceeds of such trust fund dissipated prior to November 6, 1901, the date of a stipulation entered into between the parties to this suit; (f) that the United States recover of I. Stanton Carter $11,454.18 for an amount of the trust fund received by him and not accounted for. Other provisions of the decree do not require mention, except that matters of allowances to be made were reserved to be passed upon at the foot of the decree. The decree of April 14 awards allowances out of the fund, and, in so far as error is assigned thereupon, the provisions are sufficiently described in the ensuing opinion.

Cross appeals are taken on behalf of Oberlin M. Carter and each of the other parties named in the title, in respect of provisions affecting them severally.

The testimony upon which the cause was heard and decided in the trial court, makes a printed and exhibit record, referred to in the opinion below as containing over 50,000 pages, which

is burdensome in its volume and contradictory in a multitude of details. Many of the printed volumes, under stipulations of the parties for their reception of evidence, embrace full reports of testimony and proceedings in other cases or hearings, in reference to the transactions in controversy, namely: (1) in a Court Martial record, upon trial of the defendant Oberlin M. Carter, under War Department order of December 2, 1897; (2) in the record of a Board of Inquiry of 1897; (3) in a proceeding before Commissioner Shields, in New York, for arrest and removal of the contractors mentioned in the bill, for trial under indictments in the Georgia District. As the hearing of the issues was not referred to a Master, except upon one issue relating to investments averred in the bill, the trial court received this mass of testimony in the various forms of submission—including examination in open court, examiners' report of testimony and matters stipulated in evidence—for determination of all questions of fact, as well as law, in controversy under the pleadings. No special findings upon the ultimate facts thus involved (aside from the Master's report upon the above mentioned subsidiary issue), appear in the record, and the only aid which is furnished to that end, for the purpose of review, appears in the references to the testimony and conclusions of fact stated in two written opinions filed by the trial judge—one filed January 9, 1908, and the other March 17, 1908—both made part of the record by an order entered April 14, 1908, when the decree was completed.

For brevity, these recitals in the main opinion referred to (of January 9), are thus summarized:

The transactions in controversy were for harbor improvements, made by the United States in the Savannah River and contiguous places within the "Savannah District," placed in charge of Captain Oberlin M. Carter. Captain Carter entered upon this charge in 1885, under General Gilmore, as Chief Engineer, continuing therein until the death of General Gilmore in 1888, when General Craighill became his superior; and Captain Carter thus remained in local charge until relieved in July, 1897, by Captain Gillette, when he voluntarily retired for other service. Prior to 1892, Captain Carter had been quite intimate with Messrs. Greene and Gaynor, who became contractors for harbor work, as hereinafter referred to and had contemplated at times private business relations with them. Of the several contracts for work in controversy,

the opinion expressly mentions two, one let October 22, 1892, for expenditures estimated at $3,000,000 in the Savannah River, and the other of October 8, 1896, for improvements in Cumberland Sound involving $2,000,000. Referring to the method of advertising adopted by Captain Carter for letting these contracts, the opinion refers to the testimony of the various officers called in reference to the usual time for such advertising, and concludes that there was no departure "from the usual course obtaining in like cases;" and that there was "nothing inherent in the matter of notice which suggests any fraudulent intent."

The specifications called for three different styles of mats to be employed in the work in quantities to be fixed by the Engineer in charge. Mat No. 1 was composed of logs laid parallel to each other, fastened together and covered with several inches of brush and then bound together by poles to the required dimensions. No. 2 consisted of artificial logs made of brush bundles (fascines), laid in alignment, tightly bound and choked at regular intervals, placed side by side, as in No. 1. Across these were placed transversely long brush logs, one on each edge of one down the middle, and all bound together by grillage poles. No. 3 consisted of brush logs firmly united by grillage poles as in No. 2, but lacking the transverse brush logs, with double sets of grillage poles, however. In performance of the work this design No. 3 was employed throughout and the complainant contends that this was much cheaper to construct and that by reason of an understanding between the contractors and Carter that No. 3 should be used, the contractors—Greene and Gaynor, operating under the name of The Atlantic Contracting Company—were able to underbid other contractors and so obtained the contracts.

The opinion reviews the testimony of various witnesses upon the question of difference in cost and concludes that there was "nothing unusual or improper in Carter's action in treating the case of the three designs as practically the same, when considered with reference to the fact that different kinds of work might require different designs on the same contract;" that "of itself it discloses no evidence of a conspiracy to defraud, nor does it tend so to do." The contention of the Government that Carter embarrassed other bidders by this method of including the three designs as of one price is, in effect, stated to be unsupported by evidence. In reference to contentions that Carter discouraged other bidders

by refusing to furnish specifications, or sending one copy only when three were required, and other complaints mentioned, the opinion states that several mistakes do appear but not any "sinister motive" therein, and that nothing appears in evidence upon the opening and letting of bids "calculated to cast suspicion upon Carter's conduct."

The contract of 1892 for Savannah River work and other subsequent contracts referred to, called for bids for mats by the square yard, and it is contended that prior to these transactions "mats had always been purchased by the cubic yard;" but it is stated that this is not supported by the evidence and that like terms appear in numerous instances of prior contracts, and that no reason appears why "this class of work should not have been dealt with by the square yard;" and that fraud can appear only in the price paid or the character of work accepted thereunder.

"Substantially all the fascines used in the several improvements under consideration were made up into mats. These fascines are required by the specifications to

> 'be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge. The fascines will be from twelve (12) to one hundred (100) feet in length [contract of 1892, and 30 to 100 feet in contract of 1896] and must be compressed tightly by an approved form of choker to a diameter of nine inches at intervals of two (2) feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush used shall be as straight and well trimmed as can be obtained. The fascines shall be carefully and thoroughly made and handled with care. They shall be piled on shore or on barges for measurement in such way as the engineer officer in charge may direct.' "

The contract of 1892 assumed the quantities of different materials to be used as: Square yards of mattresses, 350,000, cubic yards of fascines, 300,000, sawn timber (feet), 800,000, Riprap stone, cubic yards, 200,000. "Under the power reserved in the contract authorizing the engineer to vary the relative amount of each, Carter increased the amount of mattresses to 1,363,572 square yards, to the practical exclusion of the other materials above enumerated. He was thus able to keep within the estimate of the cost of the whole and within the appropriation, while, at the same time, he accomplished

the results sought for. Conceding the power of the engineer in charge to make such a redacil change, some of the expert witnesses were of the opinion that the proposed change should have been submitted to the War Office for approval, in view of its radical nature. For defendant it is insisted that the frequent reports showing the progress of the work advised the Department of what was being done, which was all that was required. It is not denied that the substitution appears fully in these reports. In and of itself no improper motive can be deduced on Carter's part from his course in this respect. The failure of the Department to call attention to the change might fairly be assumed to indicate approval."

"The specifications provide that the third design mattress, i. e., the one actually used,

> 'will consist of a bottom grillage of poles of live saplings, of pine or other timber of a kind approved by the engineer officer in charge. The pole must be straight, of slight taper, of an average diameter of from four (4) to five (5) inches, and not less than three (3) inches at the small end, and must be placed from four (4) to eight (8) feet apart between centers, both longitudinally and transversely, and spliced together with long scarf joints in a manner satisfactory to the engineer officer in charge. Upon the grillage will be placed a layer of closely compacted fascines, surmounted by a top grillage similar in design to the one at the bottom. The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such manner as the engineer officer in charge may approve.'

"It is further provided therein that,

> 'The size of the mattresses will be fixed by the engineer officer in charge from time to time. In general they will be from twenty (20) to one hundred (100) feet in width, have such lengths as may be convenient for handling, &c.'

"It is also provided therein that,

> 'As a general rule all material will be measured by the engineer officer in charge, or his representative, after their arrival upon the ground and just before being placed in the work. The mattresses may also be inspected as made.'"

The bid of Greene & Gaynor for mattresses per square yard

was ninety-five (95c) cents and for fascines per cubic yard one dollar and sixty ($1.60) cents, and the Government contends that the fascines should have been procured and measured by the cubic yard, and when required made into mats without additional cost, as shown in prior contracts, where it appears, however, "that the amount of mattresses required was nominal." It appears from the evidence that while small quantities of brush fascines can be readily obtained in most localities, "large quantities are hard to get," and the testimony of Captain Carter is accepted that it would take about nine of the fascines made from the brush found on that coast and "choked to nine inches and one yard long to made a cubic yard," while "the same fascines put into the form of a brush mattress would compress so that four to the square yard would be required and when subjected to the pressure and weight of an eight course multiple mattress, it would take six fascines to make a square yard, as against nine in a cubic yard, or perhaps ten;" so each square yard would require 6/10s of a cubic yard of fascines, or Ninety-six cents (96c), and with grillage poles added the cost of one square yard of fascines in multiple form mat would thus amount to One dollar and nineteen cents ($1.19).

In September 1893 the contractors began under the 1892 contract to construct what are termed multiple mats or mattresses, for which no provision was made in the contracts, specifically. These "consist of one mattress imposed upon another, varying from two to as many as sixteen, according to the needs of the construction. They were built upon the deck of a barge, especially prepared for the purpose, with facilities for sliding them from the deck into the positions desired. It is claimed by Carter and seems to be conceded, that this method of planting the brush mats was found to be very desirable in order to prevent the undermining which preceded the laying of single mattresses or stone work. The scouring produced by the resistance of the single stone-loaded mats to the currents had a tendency to cause the currents to work around the outer end of the single mat and stone work and undermine it. By the use of the multiple mats the construction proceeded so rapidly and so affected the currents as to prevent the bottom wash, whereby a more even foundation and other good results were obtained. In addition, it seems the single mat, when separately loaded with stone for ballast, was apt to sink into the soft bottom of the river, sometimes

to the depth of seventy feet. By the use of multiple mats, it was possible to sink eight courses of mattresses with the same amount of stone as is required by the specification in sinking one mattress. Thus seven courses of stone were saved, while at the same time the construction was laid rapidly and made less liable to sink into the muddy and sandy bottom of the river. To build these multiple mattresses without making the openings between the different layers too large, the double grillage was omitted from all the mattresses except the lower side of the lower mattress and the top of the upper mattress. There would be only a half grillage between the intermediate tiers of fascines. The multiple mat was firmly bound together with wire and by other prescribed methods, so that the whole formed a compact body of large dimensions, often one hundred and more feet wide and fifty feet long, weighing sometimes two hundred tons. The barge was then towed out to the place where the mat was to be placed and by means of a lowering adjustment located on the side of the barge next to the destined place, the mat was slid off into the water and into position and weighed with stone sufficient to sink it and hold it in place. Complainant insists that thus a large saving was made to the contractors both in material and labor in that they were saved the trouble of planting each mattress separately, and the cost of the unused grillage poles. The saving in stone accrued to the Government, except so far as it was otherwise expended, more particularly in paying for the extra fascine work. The use of multiple mats on the Savannah River work is warmly approved by most of the experts and is fully justified by the evidence. It is also clear that for the purposes of that work it was desirable that the grillages be made single, except at the bottom and on the top of the multiple mattress." After recapitulation of the conflicting testimony as to the advantages of this plan of multiple mattresses, the opinion states that "there seems to be little ground for questioning the good judgment and skill of the engineer in charge in causing the mats to be put together and used in the multiple form, nor is it apparent that there was anything suspicious in his not insisting on a reduction in price per square yard for mats laid in multiple form, as against individual mats, provided they came up to the specifications."

The opinion comments on the want of specific testimony from which "to ascertain just what was the construction of the mattresses, multiple and single, under the 1892 contract"

but that it seems to be conceded that they were substantially like those in evidence under the 1896 contract, except that "they contained something more of grillage." The Government's contention in respect thereof are then stated in substance, (1) that they were accepted "in lengths varying from twelve to eighteen feet, instead of twelve to one hundred feet, as required under the 1892 contract, and thirty to one hundred feet, as required under the 1896 contract, according to Carter, to facilitate hauling from camp to barge, saving to contractor 25% of cost;" (2) that they were not well trimmed; (3) did not contain the quantity and quality of material required; and (4) were not arranged and tied according to the specification. The opinion states that the provision of design No. 2 that brush is to be "carefully laid in the fascines so as to break joints and to make a continuous fascine, extending completely across the mattress" is not expressed in the specification of design No. 3 used by Carter in this work; but "that no reason appears under the evidence why it should not be required in one as well as the other, and it does appear that fascines one hundred feet long were difficult to transport from the camp to the barge." No continuous fascines were required by Carter and he claims that the work was thereby hastened without injury to the Government; nor does it appear that continuous fascines "added anything to the merits of the mats." Allowance, therefore, of the short fascines is not deemed such departure from the contract as would authorize the engineer to require the contractor to reduce the price therefor, and while the latitude thus left with the engineer "might easily be abused," it is not "per se evidence of a misuse of it to waive the more expensive construction when no disadvantage would thereby accrue to the work in hand." The contract provided that "the brush used should be as straight and well trimmed as can be obtained," and the question is discussed whether this provision intends what are known as "military fascines" consisting of "trimmed rods or poles so bound together as to constitute a compact bundle," or the ordinary fascines made of live brush mentioned in another part of the contract; and considerable of the testimony is reviewed in reference to such contention, with the deduction that the evidence does not sustain the contention that military fascines were intended. Upon the contention, however, that the fascines furnished under the 1892 contract were not well trimmed, so that the bulk was increased for measurements, while the mattress was

not made "sufficiently solid" for the work, the conflicting evidence is referred to with this conclusion stated: "The evidence leaves the court with the impression that there was carelessness in the manner in which some of the work was done, indeed carelessness for which Carter was justly entitled to be criticized; but considering the material results, the magnitude of the work, and assuming the absence of any mercenary or any other ulterior motive on Carter's part, except such as might justly be deduced from the facts so considered * * * Carter's course in the premises was not necessarily in abuse of the discretion vested in him, nor seriously inconsistent with his claim that he discharged his duty to the Government, so that the Government has failed to maintain its case" in this particular. Comment is also made in reference to the numerous eminent engineers testifying in favor of the work as constructed, that "it is an impressive fact in this case that the defendant is so emphatically endorsed by these men, who are above suspicion."

The opinion proceeds, however, to consideration of the circumstantial evidence offered by the Government as tending to support the charge of fraudulent conduct on the part of Carter in the letting of these contracts and acceptance of work thereunder, namely: The great volume of evidence introduced in support of the charge that the profits thus realized by the contractors were divided between such contractors and one Westcott, the father-in-law of Carter, and were paid over for the benefit of Carter and invested in real estate and securities which are now traced to Carter's possession, exceeding $400,000 in amount.

After commenting on the "ingenuity and patience" on the part of the complainant, which had resulted in tracing the actual divisions of the amounts paid to the contractors month by month, to the bank account of R. F. Westcott, together with proof of the investment of like amounts in various securities and real estate from time to time and of subsequent transfer thereof by Westcott to Carter, and that such facts are so well established that they are substantially uncontroverted by counsel for Carter, except in reference to certain of the securities which are claimed to have arisen from other sources; and then referring to the contentions of Carter that such divisions and sources of the investments were unknown to him and not even suspected and the securities were received by him upon the understanding that they were a gift for reasons stated, the opinion remarks: that "there is no legal presump-

tion here that Carter knew what was going on and had been a party to it;" but that, nevertheless, the burden was cast upon him to explain "very many items shown in the accounts in evidence." It then states that the transactions in suit "cover the period from December 1891 to 1897 during which period a number of contracts were let and that even though Carter was not in actual conspiracy with the contractors, yet, if he knew of their vast profits on the prices allowed them on the earlier work, it was his duty to investigate thoroughly the situation and see to it that the Government thereafter paid no more than was fair and just, even negligence under such circumstances would have amounted to fraud. If, therefore, Carter was cognizant of the fact that the contractors were reaping an abnormal profit from the 1892 work, and that Westcott was interested in that profit and was turning it over to him under any kind of a cover as and for his share of said profit, he was false to his trust and should be held liable to make good to the Government all the fruits of his fraudulent acts. This, of course, presupposes that such profits, if any, accrued out of fraud upon the Government in the matters of letting or accepting the contracts in question, or both. If the Government lost nothing by the transaction there is nothing due to it."

The opinion then concludes as follows:

"The evidence discloses a shameful course of treatment of the workmen employed by the contractors in cutting and otherwise handling the brush used in these constructions. They were paid little or nothing over and above their living, and that, too, of the worst. No doubt some shameful part of the profit reaped from these harbor constructions came in this way. How much can never be ascertained. Certainly not all of it, nor even, relatively speaking, a considerable portion thereof. It is also claimed that some of the saving to the contractors arose from the fact that they or some of them claimed a patent or patents upon the methods for handling multiple mats. The record discloses no basis upon which to estimate that saving, if indeed it resulted in any saving, so that it is without moment at this time. Undoubtedly, constructions of the character now involved, afford, when held down to a fair advance on actual cost, little or no inducement to contractors, because of the element of chance growing out of the weather and water conditions. Liberal allowance should, under the evidence, be made to cover such contingencies, but when all these considerations are borne in mind and given due weight,

it is still beyond controversy from the record that a great wrong was practiced upon the Government by the contractors.

"The evidence to be found in the record with regard to the financial transactions of Carter and Westcott and the contractors Greene and Gaynor is both vast and intricate and entirely circumstantial. It has been read and re-read by the court as presented in the briefs and depositions. To recite it here is of no value. Suffice it to say that without passing directly upon the questions as to whether Carter had actual knowledge of and connived at this raid upon the Government, the facts brought out concerning these financial transactions are such that he must, as a conclusion of law, be held chargeable with knowledge of what was being done in the premises. This fact alone makes it clear that the Government is entitled to a decree awarding to it each and every of said pieces of property held by the receiver which shall be found to have been purchased directly or indirectly with moneys received by Westcott, or any one else, or in any other way arising from funds made up of profits realized by the contractors under the contracts in suit, and it will be so ordered."

For the purpose of ascertaining the securities in evidence which are thus chargeable as held in trust for the Government and for ultimate decree in respect of all securities impounded in the hands of receivers, or otherwise, the hearing was continued and the second opinion (March 17) treats of such ascertainment and disposition of the securities with reference to the evidence tracing the origin of the securities; and thereupon the securities were set apart, as mentioned in the decree.

The following stipulation, which was entered into between the parties to the bill, pending proceedings on the part of the receiver to obtain possession of securities mentioned in the bill as held by one or the other parties named, is referred to in the decree and becomes material for consideration of various assignments of error, viz:

"United States of America } ss.

United States of America
v.
Oberlin M. Carter, *et al.* } In Equity.

Pending on bill and auxiliary bills in the Circuit Courts for the Southern District of New York, District of New Jersey, Southern District of Georgia, Southern District of West Virginia, Northern District of Illinois and Southern District of Illinois.

"AGREEMENT.

"It is agreed between the United States, complainants, and Oberlin M. Carter, I. Stanton Carter and Lorenzo D. Carter, defendants in the above entitled cause, as follows:

"(1) The issue as between the United States and Oberlin M. Carter as to the fraudulent diversion of funds, intrusted to him as disbursing officer, into the assets as charged in complainant's bill pending in the several districts, shall be brought to final decree first in the Circuit Court of the United States for the Northern District of Illinois, and the final decree of that Court, unless reversed by the appropriate appellate court on appeal, shall be conclusive on all questions determined therein, and shall be made effective by appropriate decrees on the bills in the other districts if deemed necessary by either party.

"But this clause shall not be construed to operate to the prejudice or delay of the Government in any proceeding against other parties for accounting in districts other than the Northern District of Illinois, who may be claiming for themselves any part of said assets.

"(2) That as to the assets claimed by the Government as assets into which it charges the funds intrusted to Oberlin M. Carter as disbursing officer was diverted, with the proceeds, income and reinvestments thereof where the form of the investments have been changed, and which assets have or may be hereafter traced into the possession, custody or control of said defendants, and have not heretofore been bona fide disposed of by them and therefore beyond their control, shall be forthwith by the said defendants turned over to the receiver appointed in this cause. But the court will determine whether the one Kentucky Central bond and one Michigan Telephone bond charged in the bill to be reinvestments of said alleged trust fund, and which bonds are claimed

by I. Stanton Carter, should be held by the receiver pending the litigation.

"(3) The said defendants shall waive their privileges and give all the information they can with regard to what property has been disposed of and its disposition, but no evidence which may be given by the said Carters in this case shall ever be used against them in any criminal proceedings, unless on a charge of perjury committed in this case. And nothing in this agreement shall be construed as affecting the right of the Government, if any it has, to recover any part of said assets disposed of by the said defendants and not turned over to the receiver.

"(4) L. D. Carter and I. Stanton Carter will forthwith dismiss their demurrers and file answers disclaiming any personal interest in the aforesaid assets in controversy in this litigation, including the real estate on 8th Avenue, New York, and at Orange, New Jersey, except as to the two bonds claimed by I. S. Carter as above.

"(5) Oberlin M. Carter shall dismiss all demurrers and exceptions and shall file promptly his answers to the bills and amended bills pending in said several districts.

"(6) All private books, papers, etc., of Oberlin M. Carter turned over to the Court Martial shall be subject to the inspection of the counsel for said Carter, and his chief counsel shall have the right to have made at the expense of the fund turned into court, a copy of any documentary evidence which has ever been used or referred to as evidence in the Court Martial or Greene-Gaynor proceeding, or in this proceeding.

"(7) From said fund to be accounted for to the receiver the sum of $5,000.00 shall be left in the hands of H. G. Stone, chief counsel of said Oberlin M. Carter, from which to compensate and cover the expense of employment of local counsel in any of the districts in which local counsel have been or may be employed in any branch of this case.

"(8) From said fund to be accounted for to the receiver, there shall be paid:

"(a) The fees, traveling expenses and other expenses of Oberlin M. Carter's Chief Counsel and of his attorney at Chicago, to be fixed and allowed by the Court.

"The importance of the case, and the means and methods taken to bring the same to a just determination speedily and not the length to which the proceedings may be protracted, to be considered as the elements of merit in fixing such fees.

"(b) Also the fee of his attorney for representing said Carter in case of any criminal trial in Georgia, if Carter should be placed on trial there prior to the final disposition of this case.

"(c) The expenses of taking evidence on behalf of said Carter, including the services of an accountant at not exceeding ten dollars per day for his services when needed and actually employed, plus his expenses, if any.

"(d) And if before the final determination of this cause the said Oberlin M. Carter shall be liberated from prison, he shall be allowed his reasonable personal expenses incurred by him while engaged in work in this cause, including the taking of evidence but with no compensation for his time. Such expenses to be determined by the court and paid out of the moneys in court.

"Payments and allowances under Paragraph numbered '8' of this agreement to be determined by the Court from time to time on petition with the right of the United States to contest the same as unreasonable, or that any expense was not incurred as stated.

"(9) The assent of the United States to paragraphs numbered '(1)', '(7)' and '(8)' of this agreement, is predicated upon the understanding that the said defendants will turn over to the receiver at least substantially all of the assets turned over to I. Stanton Carter, and L. D. Carter, by J. H. Paul and R. E. Westcott and James Bragg, or their proceeds and reinvestments, except such as has been, prior to the receivership, bona fide paid out or pledged by them for attorneys fees or as expenses in defense of Carter, or expended by them legitimately in the handling of said properties, or which has not already been taken possession by receivers in this cause.

Nov. 6, 1901.

UNITED STATES OF AMERICA,
By MARION ERWIN,
Special Asst. to Attorney General.
OBERLIN M. CARTER,
LORENZO D. CARTER
I. STANTON CARTER,
By HORACE G. STONE,
their Chief Counsel."

Other facts in evidence, in so far as deemed material for the purpose of review, are mentioned in the ensuing opinion.

Seaman, Circuit Judge, after making the foregoing statement, delivered the opinion of the Court:

The appeal and cross-appeals for review of the decree (in two parts) entered in this cause raise no questions of law, as we believe, in reference to the primary charge of liability under the bill, which are not elementary and well settled. With no special findings of fact in the record, however—beyond the recitals and deductions stated in the written opinion filed by the trial Judge as premise for the decree—solution of the ultimate facts for the purposes of review has involved examination, not only of voluminous abstracts of the testimony contained in the printed arguments, but of many pages of testimony in the record, cited in the above mentioned opinions and in the arguments of counsel. The basic averments of the bill, of great losses suffered by the United states, through payments made to the contractors, Greene and Gaynors, of prices for their work (furnished under successive contracts), grossly in excess of value, are supported by a mass of evidence, direct and circumstantial, which impresses us to be both sufficient and substantially uncontroverted.

1. In support of the charges against the defendant Oberlin M. Carter, of primary liability for conspiring with such contractors to defraud the United States under the several contracts and thus obtaining a share of the illicit proceeds, the charge of fraudulent conduct on his part rests on circumstantial evidence, although the fact is proven and undisputed that he obtained, directly or indirectly, a large share of the profits arising from such contracts. The extent of testimony and multiplicity of facts and circumstances in evidence, upon the issues of conspiracy and the so called "engineering features of the case" involved therein, preclude any attempt to analyze the conflicting testimony or make any summary within reasonable limits for an opinion; and we are impressed with no view which requires or justifies extended discussion of this class of testimony. The ultimate facts, however, upon which decision of this issue of primary liability may rightly rest, as we believe, are either uncontroverted facts in evidence, or inevitable deductions from facts well established, to be presently stated.

Under appropriations by the Congress and plans and estimates made by the Engineering Department for harbor improvements from time to time, in the Savannah District, the

United States carried on the work in controversy from 1892 to 1897, with Captain Carter in local charge, as engineer and disbursing officer. Specifications were prepared by Captain Carter, and upon approval by his superiors in each instance, he advertised for bids and let contracts for the work. One of these contracts, made October 22, 1892, comprised expenditures in excess of $3,000,000—and is the main subject of controversy—while another, made in 1896, amounted to $2,000,000. Captain Carter was an officer of the army of exceptional ability both as an engineer of harbor work and for business qualities. The work as carried out under the successive contracts, aside from dredging, mainly consisted of mattresses or "mats," made of brush fascines united by grillage poles; and all contracts for this class of work were (directly or indirectly) let to the Atlantic Contracting Co., as the lowest bidders, with all operations performed by Greene and the Gaynors, composing that corporation, who had long sustained relations of intimacy with Captain Carter. Such discretion as was vested in the engineer in local charge, under Department regulations, was exercised to employ this mattress structure for the major part of the work, instead of timber or stone work (included in the specifications and authorized under the contract), and as well instead of dredging specified; so that, under the contract of 1892, brush mattresses were used to the amount of 1,363,372.36 square yards, instead of 350,000 square yards estimated in the specifications and contract; and this aggregate was kept within the appropriation by omitting other work specified. In reference to this undisputed fact of substitution and increase of mattress work, explanations appear in the testimony, that it was found to be advantageous for harbor improvement, and its efficiency is upheld by the concurring opinions of many eminent engineers who testify thereupon; so the foregoing statement is not to be understood as intimating doubt, either of authority to make such changes in the interest of the government, nor that such substitutions were not effective for a great work in the improvement of harbors. The extension of the contract rate of 1892, however, to include the large increase of mattresses, measured by the square yard—which were made by the contractors in so called "multiple mats," in courses of two to sixteen in number, thus built up on the barges, towed to the work and launched in place, each course being measured for payment—together with continuance of like general specifications and estimates, in each subsequent call for bids and letting of contracts, are

obviously entitled to consideration as circumstantial evidence upon the issues of fact, when linked with the above mentioned fact of abnormal profits thus realized by the contractors and other circumstances in evidence.

These further general facts are established by the evidence and not controverted: The contracts which are directly involved in the controversy were let to and performed by Greene and Gaynor (as the principal contracting parties) during the years 1892, 1893, 1894 and 1895, and work was paid for by disbursement checks issued by Captain Carter periodically, at Savannah. Upon receipt of the checks it was customary for Greene or Gaynor, or both, to visit New York, where their principal bank account was kept, and the proceeds of checks not used at Savannah for payments upon the work, were there divided between the contractors and a third party—R. F. Westcott, who was the father-in-law of Captain Carter, residing in New York, retired from active business with large means, and not engaged in the transactions in any manner disclosed by the evidence, aside from such sharing in the proceeds. Discovery of these divisions and of innumerable details in evidence involved great skill and patient research through various bank accounts, books of account, checks and other vouchers; but the proof is clear, both of the facts of division and of the actual amounts turned over—usually found in Westcott's account, but instances appear of corresponding amount deposited by Carter—and after 1892 the shares are identified as exactly one third of the entire proceeds retained in New York; presumably profits under the contracts. This line of proof states the aggregate of payments made to the contractors under the successive contracts (prior to the 1896 contract) to be.....$2,567,493.18
while the proceeds thus divided into three shares aggregate.....$1,815,941.62

Investments in securities are traced which approximate in date and amount the receipts from these divisions, in numerous instances, and coming to the possession, first of Westcott and then of Carter, aside from occasional instances contrariwise, but ultimately reaching the hands of Captain Carter—mainly through a transfer made by Westcott, on October 29, 1897, of securities aggregating over $400,000 in amount, for which Carter's receipt is in evidence and undisputed. The search for these transactions extended to many localities, through numerous entanglements, and the only disputes aris-

ing are upon various details of specific identity and course, which leave uncontroverted the systematic disposition above stated.

Abundant evidence appears of the presence of Captain Carter in New York, upon monthly visits which coincide in date with those of Greene and Gaynor, and of his intimate relations with Westcott—both before and after the death of Mrs. Carter, daughter of Westcott, who died in December, 1892, leaving no child—including attention to large financial interests of Westcott in 1895, under power of attorney, while the latter was absent in Europe. It does not appear, however, that Carter took part in or was present at any of the divisions, referred to between the contractors and Westcott; nor is there any direct evidence that he was informed thereof, or was mentioned or intended in such transactions to be the beneficiary of such shares, unless an offer on behalf of the United States of purported testimony by Westcott (since deceased), as a witness for the government in extradition proceedings against Greene and Gaynor—in a record stipulated in evidence in other respects—is admissible to that end. Whether the objection raised on behalf of Captain Carter in the first instance, to this offer, was not waived by counsel in a subsequent consent to its consideration by the trial court, is not free from doubt. As Captain Carter was not a party to such proceeding, however, we believe this testimony of Westcott to be inadmissible against him upon the issue referred to. It is, therefore, excluded from the present inquiry, while reserved for later consideration by way of notice to the defendants I. S. Carter and L. D. Carter, under admissions of record on their part.

We concur, therefore, in the view expressed in the opinion filed by the trial Judge, that the charge of conspiracy between Captain Carter and the contractors to defraud the United States, under the contracts referred to is: (a) neither established by direct evidence, (b) nor can such charge be upheld under the testimony alone of methods adopted in making specifications, advertising for bids, treatment of proposed bidders, or letting contracts, (c) nor under one or the other several branches of testimony reviewed in the opinion, considered independently of the entire chain of circumstances. But these conclusions are not the tests of sufficiency of the entire chain of circumstantial evidence to sustain that charge. While the fact is established, as there stated, "that a great wrong was

practiced in this raid upon the government," we are not satisfied that the right of the United States "to a decree awarding to it" all property in question "arising from funds made up of profits realized by the contractors" therein, may rightly rest, as there stated, upon the proposition that Carter must "as a conclusion of law be held chargeable with knowledge of what was being done in the premises."

Under the settled facts above recited, however, linked with cumulative evidence, tending to prove actual knowledge on the part of Captain Carter of the excessive profit in the mattress work and of divisions thereof with Westcott in New York, and complicity in the fraudulent transactions, of which (at one time or another) he acquired approximately one third of the net proceeds, we are constrained to the belief, that the evidence is decisive, not only of fraud perpetrated by the contractors, but of concurrence and participation therein by Captain Carter. Whether the parties conspired to that end at or prior to the letting of the contract of 1892, can neither be ascertained from the testimony, nor is such inquiry deemed material upon the issue. With the completion of the mattress-work expressly stipulated in that contract, it cannot be doubted under the testimony, that Captain Carter, having personal supervision of the work, as an engineer of great experience and ability in harbor improvements, must have discovered the exorbitant profit afforded at the contract price of mattresses, measured by the square yard. Assuming, therefore, that the terms contracted for were fairly obtained and believed by him to be reasonable when made, and that the discretion vested in the officer in charge was rightly exercised in greatly extending mattress-work, instead of carrying out the plan of widening the channel by dredging (as let to another contractor) and of stone work (embraced in the Greene and Gaynor contract), no just ground appears for continuing the same terms, for such extension from 350,000 to 1,363,372 square yards, yielding to the favored contractors another great ratio of excessive profit, if the unreasonableness of the contract terms was then understood, or was readily ascertainable under the circumstances. This transaction, moreover, was followed up by the succession of contracts in evidence, for other improvements in the district of like nature—under the same form of specification and advertisement for bids, to cover alternative structures at a single price as ordered; so that no bid was entertainable for the mattress-work alone,

which was intended and used in the improvement, nor was the "multiple mat" structure (as used) mentioned in either notice—and all were obtained by Greene and Gaynor; all were carried out, measured and accepted alike with the earlier contract work, up to the appointment of a successor to Captain Carter. The fact alone of successive contracts thus let to these contractors, at prices far beyond the reasonable value of brush mattresses, whereby the United States was plainly defrauded in overpayments approximating $2,000,000 —without proof of tenable excuse for the letting, through emergency or other cause—implies either participation in benefits or collusion on the part of the officer having direction of the work. As the evidence further establishes, not only personal and business intimacy between Captain Carter and these contractors, but his constant presence with them in New York, upon the monthly visits to settle accounts and divide the proceeds between the contractors and Westcott as before stated, together with the cogent fact that Carter acquired the share of illicit profits turned over to Westcott, we believe the inference of fact to be inevitable, that Captain Carter connived with these parties in thus defrauding the United States. The question whether the relation of Westcott in these divisions, was one of partnership in the contracts (as stated in the opinion below and contended in the argument of counsel for Carter on these appeals), or was that of a mere representative of Carter therein (as counsel for the government contends), may not be clear under the testimony; but neither contention requires discussion or solution under the foregoing view, for the reason that Carter is equally subject to the relief sought in this bill, whatever may be the actual relation of Westcott to either of such parties in the transactions.

The bill is voluminous—necessarily so in the light of the array of circumstances involved for equitable relief—and both bill and decree rest upon the well settled principle of equity, that property so obtained by Carter, in fraud of the United States, becomes trust property in favor of the defrauded party, which may be followed up and recovered, whether preserved in its original form or in substituted property. May v. LeClaire, 11 Wall., 217, 236. The testimony is convincing, if not substantially uncontroverted, that the share acquired by Carter, from or through the divisions between the contractors and Westcott, exceeded the entire amount of property and securities traced to the possession of Carter and impounded in

this suit, under the several bills; that the major portion of the property in the custody of the court is identified as directly derived from shares of proceeds so obtained, and constitutes the portion scheduled in the decree as a trust fund belong to the United States, and thus awarded to it; and that Captain Carter has expended and used from funds and securities in his possession, after so obtaining the share of fraudulent proceeds above stated, large amounts of money, greatly exceeding in the aggregate any amounts which can be assumed to be derived by Carter from other sources, under the most favorable view of his testimony in respect thereof.

The provision of the decree, therefore, which awards to the United States the property and securities in custody which are above referred to as directly traced to the proceeds of the fraudulent transactions constituting a trust fund, is well supported by the testimony, as we believe, and will be affirmed accordingly. Another provision of the decree, however, adjudicates that other securities and stocks, specified in a paragraph marked "(2)," were "not purchased with said trust fund, but with the private funds of Robert F. Westcott and Oberlin M. Carter," and awards such residue to Captain Carter, as not subject to the trust. We believe this provision to be erroneous, irrespective of the contentions on behalf of the government, that these investments are otherwise fairly traced to the trust fund, either directly or indirectly, or by way of substitution in fact. Under the circumstances above recited, with the mass of investments coming to his hands (from whatever source) intermingled and secreted by Carter, asserting title as an entirety, we are of opinion that the elementary doctrine of equity requires, that his personal expenditures from the mass be made chargeable against any portion which may be his own; that he cannot be permitted (as sought through his testimony in this case) to segregate a portion from the residue, to be awarded to him as free from the trust, and thus impose the burden of all expenditures so made upon the trust fund; and that, for all purposes of the decree, all the property and securities (in custody) therein described, are within the trust, either as original or substitute investments from the trust funds. So, the decree must be corrected in respect to such provision, and award title to the securities and stocks mentioned to the United States, without award of any part or portion to Carter.

2. The decree denies the complainant a deficiency decree

against the defendant Oberlin M. Carter, upon its election to take such judgment for proceeds of the trust fund which was "dissipated by Oberlin M. Carter and his agents, prior to November 6, 1901," as established by the evidence. Upon this denial error is assigned by the appellant, United States (16th assignment), and we disregard the order of the several provisions and assignments to consider the question thus raised as next in sequence.

It does not appear upon what theory this election and motion was denied, nor is any tenable ground suggested therefor in the argument of counsel for appellees. The facts and items upon which the motion rests are undisputed, and it is unquestionable that the equitable relief may be thus extended where trust funds have been dissipated. The limitation named (November 6, 1901) for such charge appears to be predicated on a stipulation of that date, entered into between the parties which embraces allowances to be made from the funds in court, pending final hearing; and thus resolves any possible doubt in reference to ultimate liability for such expenditures, in favor of the defendants. For the amount of such deficiency judgment, the items of conversions from the trust property aggregate $105,019.66, as scheduled from the evidence. In view, however, of the above mentioned finding by the trial court, that the securities set apart to Captain Carter, in paragraph "(2)" of the decree, were not derived from the fraudulent transactions, and of our conclusions (as above stated) that such securities are, nevertheless, subject to the trust, as substitutes for securities dissipated, their face value (as scheduled) should be deducted from the above mentioned aggregate, to ascertain the amount of the deficiency judgment. The decree will be corrected to grant a judgment for deficiency so ascertained.

3. The several provisions of the decree respecting the defendants Lorenzo D. Carter and I. Stanton Carter, next arise for review, and being of like class are grouped for consideration. Those provisions upon which the appellant, United States, assigns error are: (1) Denial of a deficiency judgment against L. D. Carter (2) adjudication against I. Stanton Carter for $11,454.18, as the amount of trust funds in his hands not accounted for and these in turn rest upon findings of a master, (on reference of special issues involved in their possession of securities), and exceptions overruled, upon

which various errors are assigned, for allowances made to these defendants for expenses and services.

The relations of I. S. Carter and L. D. Carter to the controversy may be briefly stated: They were brothers of Captain Carter, and received from him the property in suit, for care and safe keeping, pending the various proceedings against him, and were assiduous in its concealment and withholding from the complainant, until accounting and surrender were required under the present proceedings. It appears, not only from numerous circumstances in evidence but through their admissions of record, that they were well advised of the charges against Captain Carter of complicity with Greene and Gaynor (which were widely published), and as well of the testimony of Westcott (hereinbefore referred to) in the Greene and Gaynor proceedings, in effect that Captain Carter was at all times the actual party in interest, and merely represented by Westcott in the transactions with Greene and Gaynor and in investments of the proceeds. I. S. Carter received and secreted in various places the larger part of the securities, about $350,000 face value, while L. D. Carter received the residue of trust property. In answer to a rule of contempt entered against them, each denied either possession or control of such property, but each subsequently made confessions and entered into an accounting before the master, pursuant to a stipulation between all parties to the bill, dated November 6, 1901. The property and securities described in the decree came into the custody of the court through this source.

(1) The errors assigned for denial of a deficiency judgment against L. D. Carter are, in substance: that he failed to pay over trust funds traced to his possession and admitted by him as received and that he was relieved from accountability therefor by allowances for expenses and services, which are alleged to be inequitable under the circumstances disclosed. The credits referred to are (*a*) for various claims for expenses incurred, aggregating $2,379.43 in excess of undisputed expenses, which are complained of as excessive and unsupported by credible testimony; and (*b*) an allowance of $12,916.66, for salary claimed due from Captain Carter for services as attorney-in-fact, under an agreement for $10,000 per annum. Upon the objections raised to items of expense allowed, we believe the findings of the master, approved by the

trial court should not be disturbed, as the stipulation (November 6, 1901) between the parties reserved for allowance assets theretofore "bona fide disposed of" by the agent. The credit for salary, however, is neither justly charged to the property thus withheld, nor within the fair meaning of the stipulation, and whatever may have been the agreement between the parties to the fraud, we are of opinion that error is well assigned for such allowance. The decree, therefore, must be corrected accordingly to adjudge recovery against the defendant L. D. Carter, for $12,916.66, of trust fund not accounted for.

(2) The decree awards recovery against I. S. Carter for $11,454.18, as the balance of trust fund traced to his possession and reported by the master, not accounted for or paid over; and on behalf of the appellant, United States, error is assigned for insufficiency of this award, upon various credits allowed by the master and approved by the trial court, for expenses and salary. As the sum of $6,750 was allowed to this defendant by way of salary, the credit accordingly was erroneous, under the above stated view in reference to like allowance in favor of L. D. Carter; but the other objections are overruled, as within the doctrine there stated in respect of the findings of fact. The decree, therefore, must be corrected to make this deficiency award $18,204.18.

4. The remaining assignments of error on the part of the United States relate to allowances made in the final decree for counsel services and other expenses incurred by the defendants, under the stipulation entered into November 6, 1901, heretofore mentioned. That ample provision for defraying such expenses out of the fund in court was intended and authorized by the stipulation referred to, plainly appears from its terms and is conceded; and the time, skill and expenditures involved in the services of counsel for which the allowances were granted are neither disputed nor questionable in the light of the record. The only objection raised to either of the provisions for such counsel is, that each is excessive. We are of opinion, however, that no abuse of discretion appears in the liberal awards made by the decree, within the purpose of the stipulation, and that no other reviewable question arises under these assignments.

The cross appeals raised no question not passed upon in the foregoing opinion in reference to the appeal and errors

assigned on behalf of the United States, and we are satisfied that neither cross appellant has just ground to complain of the decree.

The decree of the Circuit Court is affirmed in respect of all provisions thereof not expressly mentioned in the foregoing opinion for correction, and the cause is remanded with directions to correct the decree in the provisions so mentioned, in conformity with this opinion.

A true Copy.
Teste:

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Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

NOTE: The decree against L. D. Carter for $12,916.66 was reduced by the Circuit Court of Appeals on April 20, 1909, to $7,577.04. (Rec., 13435-36.)